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CASES

IN THE

COURT OF COMMON PLEAS

AND

EXCHEQUER CHAMBER.

BY

JOHN SCOTT,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

VOL. VI.

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JUDGES

OF

THE COURT OF COMMON PLEAS.

The Right Hon. Sir NICOLAS CONYNGHAM TINDAL, Knt., L. C. J.
The Hon. Sir JAMES ALLAN PARK, Knt.
The Right Hon. Sir JOHN VAUGHAN, Knt.
The Right Hon. Sir JOHN BERNARD BOSANQUET, Knt.
The Hon. Sir THOMAS COLTMAN, Knt.

ATTORNEY-GENERAL.
Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.
Sir ROBERT MOUNSEY ROLFE, Knt.

ERRATUM.

Page 402, marginal note, line 15, for " had " read " bad."

TABLE OF CASES.

Abernethy, *v.* Paton - 586
Alderson, Raine *v.*, - 691
Alexander *v.* Bonnin - - 611
Alsager *v.* Spalding - 204

Baillie *v.* Kell - - 379
Barclay *v.* Collett - - 408
Barnes, Doe *d.*, *v.* Roe - 525
Barth, Doe *d.*, *v.* Roe - 433
Bateman *v.* Dunn - - 739
Benn *v.* Greatwood - - 891
Binney, Holmes *v.*, - 346
Birch, In re, - - - 185
Birmingham (London &) Railway Co., The Duke of Grafton *v.*, - - 719
Blake, Dykes *v.*, - - 320
Bonnin, Alexander *v.*, - 611
Bottomley *v.* Forbes - 866
Bourne, James *v.*, - - 231
Boyd *v.* The Croydon Railway Co. - - - 461
Brighton, Norris *v.*, - - 752
Bringloe *v.* Goodson - 502
Brookes *v.* Humphreys - 756
Brown, Hocken *v.*, - 194
Bulmer, Huntley *v.*, - - 247
Burkitt, Hartley *v.*, - 497
Butler, Wilson *v.*, - - 540

Callander *v.* Oelrichs - 761
Cannon, Cox *v.*, - - 347
Capper, Reeves *v.*, - 877
Cattell *v.* Gamble - - 733
Cauty, Houlditch *v.*, - 209
Chanter, Poensgen *v.*, - 300
Clarke, Day *v.*, - - 886
——— *v.* Goldsmid - - 894
Clayton, Simpson *v.*, - 469
Cobham, Roe *v.*, - - 146
Collett, Barclay *v.*, - 408
Compton, Stone *v.*, - - 846
Cook, Matson *v.*, - - 179
Cox *v.* Cannon - - 347
Croft, Peters *v.*, - - 897
———, Read *v.*, - - - 770
Croydon Railway Co., Boyd *v.*, - - - - 461
Curling *v.* Sedger - - 678

Dalton *v.* Gibb - - - 751
Davies, def., Evans, dem. 372
———, dem., Lowndes, ten. 435, 738
Dawes *v.* Solomonson - - 596
Dawson *v.* Parry - - 890
Day *v.* Clarke - - - 886
Delegal, Place *v.*, - - 249
Dewick, Fisher, *v.*, - - 587
Dickens, Doe *d.*, *v.* Roe 754
Doe *d.* Barnes *v.* Roe - 525
——— Barth *v.* Roe - - 433
——— Dickens *v.* Roe - 754
——— Gatehouse *v.* Rees 161
——— Knott *v.* Lawton - 303
——— Martyns *v.* Roe 610
——— Scott *v.* Roe - - 732
——— Tatham, Wright *v.*, 58
Driffin *v.* Taylor - - 141
Dumelow, Tarleton *v.*, 687, 843
Dunn, Bateman *v.*, - 739
Dykes *v.* Blake - - - 320

Edney, Pitches *v.*, - 582
Elliott, Heath *v.*, - - 172
Engler *v.* Twysden - 580
Evans, dem., Davies, def. - 372
Evens *v.* James - - 354

Fearnley, Wright *v.*, - - 813
Fergusson *v.* Norman - 794
Fisher *v.* Dewick - - 587
——— Waring - 377
Forbes, Bottomley *v.*, - - 866
Franks *v.* Price - - 710
Freeman, Malins *v.*, - 187

Galloway, Jackson *v.*, - 786
Gamble, Cattell *v.*, - 733
Gatehouse, Doe *d.*, *v.* Rees 161
Gibb, Dalton *v.*, - 751
Goldsmid, Clarke *v.*, - - 894
Goodson, Bringloe *v.*, - 502
Gould *v.* Oliver - 648, 884
Grafton (Duke) *v.* The London and Birmingham Railway Company - 719
Graham, Wettenhall *v.*, - 603
Greatwood, Benn *v.*, - 891
Gunn, Pawle *v.*, - - 286

Hall *v.* Swift - - 167
Hardy, Magrath *v.*, - - 627
Harland, Newton *v.*, - 186
Harrison *v.* Heathorn - 283
Hartley *v.* Burkitt - 497
Haward *v.* Smith - - 438
Heath *v.* Elliott - 172
Heathorn, Harrison *v.*, - 283
Hebden *v.* Ruel - 442
Hinchliffe *v.* Lord Kinnoul 650
Hocken *v.* Brown - 194
Holdsworth, Ex parte - 170
———, Staples *v.*, 605
Holmes *v.* Binney - - 346
Hood, Pilmore *v.*, - 827
Hooper, Woof *v.*, - - 281
Horne *v.* Redfearn - 260
Houlditch *v.* Cauty - - 209
Howard, Powell *v.*, - 826
Howell, Wilson *v.*, - - 540
Huntley *v.* Bulmer - 247
Humphreys, Brookes *v.*, - 756

Ingram *v.* Lawson - 775
Ireland *v.* Thompson - - 691

Jackson *v.* Galloway - - 786
James *v.* Bourne - - 231
———, Evens *v.*, - - 354

Kinnoul (Lord), Hinchliffe *v.*, 650
Kell, Baillie *v.*, - - 379
Knott, Doe *d.*, *v.* Lawton - 308
Knox, Miller *v.*, - - 1

Landers *v.* Lee - - - 732
Lawson, Ingram *v.*, - 775
Lawton, Doe *d.* Knott *v.*, - 308
Lee, Landers *v.*, - - 732
Lemon, Robarts *v.*, - - 576
Lillie, Wilson *v.*, - - 540
Line *v.* Stephenson - - 447
Linstead, Rice *v.*, - - 895
Lloyd, dem., Nicholas, def. 355
Lowndes, ten., Davies, dem. 435, 738

Magrath *v.* Hardy - - 627
Mantz, Young *v.*, - - 277
Malins *v.* Freeman - - 187
Martin *v.* Smith - - 268
Martyns, Doe *d.*, *v.* Roe - 610
Mason *v.* Whitehouse 246, 575
Masterman, Ex parte, - 782
Matson *v.* Cook - - - 179
Miller *v.* Knox - - 1
Moody *v.* Morgan - - 842
Morgan, Moody *v.*, - - 842

Newham *v.* Taite - - 574
Newton *v.* Harland - 186
Nicholas, def., Lloyd, dem., 355
Nicholls, Stafford *v.*, - - 577
Norman, Fergusson *v.*, - 794
——— *v.* Winter - - 378
Norris *v.* Brighton - - 752

Oelrichs, Callander *v.*, - 761
Oliver, Gould *v.*, - 648, 884
Oram *v.* Parker - - 245

Parker, Oram *v.*, - - 245
Parry, Dawson *v.*, - - 890
Parsons *v.* Pitcher - - 298
Paton, Abernethy *v.*, - 586
Pawle *v.* Gunn - - - 286
Pearse, Verbecke *v.*, - 406
Perring, Wilson *v.*, - - 540
Peters *v.* Croft - - - 897
Phillipps *v.* Yeardley - 602
Pilmore *v.* Hood - - 827
Pitcher, Parsons *v.*, - - 298
Pitches *v.* Edney - - 582
Place *v.* Delegal - - 249
Poensgen *v.* Chanter - 300
Poras *v.* Wilkins - - 893
Powell *v.* Howard - - 826
Price, Franks *v.*, - - 710

Raine *v.* Alderson - - 691
Read *v.* Croft - - - 770
Redfearn, Horne *v.*, - 260
Rees, Doe *d.* Gatehouse *v.*, 161
Reeve, Watson *v.*, - - 783
Reeves *v.* Capper - - 877
Regulæ Generales, 351-354, 709
Reynolds *v.* Wedd - - 699
Rice *v.* Linstead - - 895
Robarts *v.* Lemon - - 576
Roe *v.* Cobham - - 146
——, Doe *d.* Barnes *v.*, - 525
——— Barth *v.*, - 483
——— Dickens *v.*, - 754
——— Martyns *v.*, - 610
——— Scott *v.*, - - 732
Ruel, Hebden *v.*, - - 442

Scott, Doe *d.*, *v.* Roe - - 732
—— *v.* Staley - - - 598
Sedger, Curling *v.*, - 678
Shufflebottom, In re - - 898
Simpson *v.* Clayton - - 469
Smith, Haward *v.*, - 438
Smith, Martin *v.*, - - 268
——— Webb *v.*, - - 147
Solomonson, Dawes *v.*, - 596
Spalding, Alsager *v.*, - 204
Stafford *v.* Nicholls - - 577
Staley, Scott *v.*, - - 598
Staples *v.* Holdsworth - 605
Steel, Wilson *v.*, - - 540
Stephenson, Line *v.*, - - 447
Stevens *v.* Underwood - 402
Stone *v.* Compton - - 846
Stulz, Twysden *v.*, - 434
Swift, Hall *v.*, - - 167

Taite, Newham *v.*, - 574
Tarleton *v.* Dumelow - 687, 843
Tatham, Wright *v.* Doe *d.*, 58
Taylor, Driffin *v.*, - - 141
Thompson, Ireland *v.*, - 601
Twysden, Engler *v.*, - 580
——— *v.* Stulz - - 434

Underwood, Stevens *v.*, 402

Verbecke *v.* Pearse - - 406

Waring, Fisher *v.*, - 377
Watson *v.* Reeve - - 783
Webb *v.* Smith - - 147
Wedd, Reynolds *v.*, - - 699
Wettenhall *v.* Graham - 603
Whitehouse, Mason *v.*, 246, 575
Wilkins, Poras *v.*, - 893
Wilson *v.* Butler - - 540
——— Howell - - 540
——— Lillie - - - 540
——— Perring - - 540
——— Steel - - - 540
——— Wilson - - 540
Winter, Norman *v.*, - - 378
Woof *v.* Hooper - - 281
Wright *v.* Fearnley - - 813
——— *v.* Doe *d.* Tatham 58

Yeardley, Phillipps *v.*, - 602
Young *v.* Mantz - - 277

TABLE OF STATUTES.

13 Edw. 1, stat. 1, c. 45—Scire facias, 891.
34 & 35 Hen. 8, c. 20—Crown grant, 719.
8 & 9 Will. 3, c. 11—Assessing damages, 598.
29 Car. 2, c. 3, s. 17—Statute of frauds, 286.
2 Geo. 2, c. 23, s. 23—Taxation of costs, 678.
c. 24, s. 7—Bribery at elections, 147.
14 Geo. 2, c. 17—Judgment as in case of a nonsuit, 434.
17 Geo. 3, c. 50, s. 8—Auction duty, 187.
39 & 40 Geo. 3, c. 99, s. 6—Duty of pawnbroker, 794.
43 Geo. 3, c. 46, s. 2—Payment into court, 699.
s. 3—Costs, 687, 886.
48 Geo. 3, c. 123, s. 1—Discharge of prisoner, 893.
55 Geo. 3, c. 184—Stamps, 260, 733.
3 Geo. 4, c. 103, s. 7—Constables (Ireland), 1.
c. 117, s. 2—Stamps, 525.
6 Geo. 4, c. 16, s. 82—Bankrupt—protected payments, 813.
7 Geo. 4, c. 57, ss. 40, 42—Insolvent debtor, 770.
s. 51—Annuity surety, 194.
11 Geo. 4 & 1 Will. 4, c. 70, s. 4—Chamber practice, 141.
s. 29—Welsh fines, 355, 372.
1 Will. 4, c. 22—Examination of witness, 738.
c. 42, s. 2—Parish lands, 179.
c. 58, s. 6—Interpleader, 843.
2 Will. 4, c. 39, s. 12—Indorsement on process, 593.
3 & 4 Will. 4, c. 74, s. 15—Recovery, 719.
ss. 84, 85—Acknowledgment, 185, 898.
5 & 6 Will. 4, c. 10, s. 179—Croydon Railway act, 461.
c. 83, s. 5—Patent, particular of objections, 587.
1 & 2 Vict. c. 45, s. 2—Interpleader rules, 843.
c. 110, ss. 3, 7—Discharge of prisoner, 739, 751, 752.
s. 9—Attestation of warrant of attorney, 895.

IN THE HOUSE OF LORDS.

1 AND 2 VICTORIÆ.

WILLIAM MILLER Esq., and JOHN MALONE - Appellants,

and

The very Rev. E. D. H. KNOX - - - - Respondent.

in the cause of

1838.

The very Rev. E. D. H. KNOX *v.* JOHN GAVAN and Others.

Tuesday, May 22nd.

THIS was an appeal against an order of his majesty's court of Exchequer in Ireland, made on Monday, the 1st

The commissioners named in, and charged with the execution of a writ of rebellion, have a right, at their discretion, to require the assistance of any of the liege subjects of the crown to aid and assist in the execution of the writ.

Such persons have such right, upon reasonable apprehension of resistance to the execution of the writ, although no actual resistance has taken place.

Such persons have such right as against persons appointed and acting as constables in Ireland under the statute 3 Geo. 4, c. 103: and that notwithstanding a regulation made in the manner pointed out by that act, prohibiting them from interfering "in the execution of any writ, decree, or civil order, or in driving for rent, tithe, or taxes, unless called out by a magistrate, or the high or sub-sheriff in person," in which case they are to consider it their duty only to protect those persons in the execution of their office—"excepting in the execution of any process directed to them for levying the amount of any recognizance forfeited to his majesty, his heirs and successors, or of any fines imposed on any jurors, witnesses, parties, or persons at any assizes or commission of oyer and terminer, or gaol-delivery, or session of the peace, in the county in and for which such constable shall be appointed pursuant to the statute 3 Geo. 4, c. 103, s. 7;" and directing that constables shall not be employed in revenue duty, unless when specially ordered.

If a stranger to the proceedings in the cause, but liable to be called upon to assist in the execution of a writ of rebellion, be regularly called upon to render such assistance, and decline so to do, the court out of which such writ issued may commit such person as guilty of a contempt of such court.

1838.

MILLER v. KNOX.

February, 1836, whereby the said court disallowed the cause shewn by the appellant John Malone, and made absolute a certain conditional order of the 11th January last, and ordered that an attachment should be awarded against him for his contempt stated in the affidavit of Robert Dudley, in refusing to aid and assist the said Robert Dudley, one of the commissioners named in the commission of rebellion in the above-named cause; and that an attachment should also be awarded against the appellant William Miller for his contempt stated in the affidavit of the said Robert Dudley: the attachment thereby awarded not to issue, and each party to abide his own costs of the motion.

Bill filed in the court of Exchequer in Ireland.

From the affidavit of Robert Dudley above mentioned, and others, it appeared, that, on or about the 6th March, 1835, a bill was filed in his majesty's court of Exchequer in Ireland by the above-named respondent, as rector and vicar of the parish of Eglish, in the diocese of Killaloe, and county of Tipperary, claiming to be entitled to composition in lieu of the rectorial and vicarial tithes of the said parish, against the above-named defendants, as occupiers of lands, and liable to the payment of composition in lieu of tithes, in respect of the same; and the said bill prayed that an account might be taken, under the decree of the court, of all sums due to the above-named respondent, as such rector and vicar, for or on account of such tithe composition, which accrued due on the 1st November, 1834, and payable out of the lands within the said parish by the above-named defendants, as occupiers, or having such interest therein as to make them liable; and that they might be respectively decreed to pay such sums as should appear on the taking of the account to be due, and might be decreed to pay the costs.

Appearance of defendants.

On the 18th April, 1835, the above-named defendant John Gavan, and several other defendants, put in their appearance by attorney.

The appellant William Miller was at the times above mentioned, and is now, by virtue of the appointment of the lord-lieutenant of Ireland, the general superintendent and inspector for the province of Munster, of the chief and other constables appointed under the provisions of the act of parliament passed in the third year of the reign of his late majesty George 4, intituled "An act for the appointment of constables, to secure the effectual performance of the duties of their office, and for the appointment of magistrates in Ireland in certain cases;" and he was directed to reside in the province of Munster, and to take under his superintendence the police appointed under the said act in the counties of Cork, Kerry, Limerick, Tipperary, and Waterford. The appellant John Malone was and is a chief constable, by virtue of a like appointment under the provisions of the said act. Various rules, orders, and regulations, were made and approved by the lord-lieutenant of Ireland, for the conduct and proceeding of the chief and other constables appointed under the said act, and were promulgated before and in the year 1833; and the conduct of the said chief and other constables has been regulated accordingly. Among these rules is the following:—"The men will on no account interfere in the execution of any writ, decree, or civil order, or in driving for rent, tithe, or taxes, unless called out by a magistrate, or the high or sub-sheriff in person; and they will then only consider it their duty to protect those persons in the execution of their office, excepting in the execution of any process directed to them for levying the amount of any recognisance forfeited to his majesty, his heirs and successors, or of any fines imposed on jurors, witnesses, parties, or persons at any Assizes or commission of oyer and terminer, or gaol delivery, or session of the peace, in the county in and for which such constables shall be appointed, pursuant to the act 3 Geo. 4, c. 103, s. 7. Constables are

1838.

MILLER v. KNOX.

not to be employed in revenue duty, unless when specially ordered."

Circulars were also issued by order of the lord-lieutenant, for the guidance of the police establishment, on or about the 26th October, 14th November, and 7th December, 1835, and communicated to the appellants at those times.

Before and on the 23rd December, 1835, the appellant John Malone was stationed at Borrisokane, in the county of Tipperary, and had under his superintendence the barony of Lower Ormond, and was under the command of the appellant William Miller, who was stationed at Cork, upwards of eighty miles distant. On the said 23rd December, Robert Dudley, of Borrisokane, delivered to him at that place a copy of a writ of rebellion, purporting to be issued out of his majesty's court of Exchequer in Ireland, and to be directed to Robert Dudley and three others, dated the 4th of December, in the fourth year of the reign of his majesty, and returnable on Saturday the 9th January then next.

Writ of rebellion.

This writ of rebellion was in the following terms:—"William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, king, defender of the Faith, and so forth—To our well-beloved and faithful Robert Dudley, George Sylvester, John Hackett, William Rennison—Greeting:—Whereas by public proclamation of the sheriff of the King's County, in divers places of the same, by virtue of our writ to the said sheriff directed in our behalf, it was commanded that James Doolan, Loughlin Meara, Michael Nolan, and John Gavan, on the peril of their allegiance by them due to us, that they should personally appear before the Chancellor, Treasurer, and Barons of our Exchequer at the King's courts, Dublin, at a certain day already past: notwithstanding, they have manifestly contemned in that particular to obey our commands: Therefore, jointly we command you, and each of

you, that you omit not by reason of any liberty, but enter the same, and wheresoever they shall be found within this our kingdom of Ireland, as rebels and contemners of our laws to attach them, or any of you to attach them, or cause them to be attached, so that you may have their bodies before the said Chancellor, Treasurer, and Barons at the King's courts aforesaid, on Saturday, the 9th day of January next, to answer us of divers transgressions, offences, and contempts by them lately done and committed, and further to do and receive in the premises what our said court of Exchequer shall then and there consider in that particular. We also command all other our officers ministerial, and other liege subjects whatsoever, that, in the execution of the premises, they be aiding and assisting as it behoveth them, on the peril incumbent. In testimony whereof we have caused these our letters to be made patent. Witness, the Right Honorable Henry Joy, Chief Baron of our said Exchequer, at the King's courts aforesaid, the 4th day of December, in the sixth year of our reign.

"William Smith. "A. R. Blake, C. R."

At the same time Robert Dudley delivered to the appellant John Malone a notice in writing, by which the said Robert Dudley required him, pursuant to the tenor of the said writ, to accompany the said Robert Dudley, and be aiding and assisting in the execution thereof; or, in default of his so doing, an application would be made to the court of Exchequer for an attachment against him for his contempt.

Upon delivering the said copy and notice, the said Robert Dudley asked the said John Malone to accompany him with the police to the parish of Eglish, to assist him in executing the said writ: to which Malone replied, that he could not go upon the said duty, but would apply to the inspector-general for instructions; and that he could do nothing without an order from the proper authorities; and, observing that the writ named only King's County, inform-

1838.

MILLER v. KNOX.

ed Dudley that he had no connexion with that county. On the third January, 1836, Dudley came to Malone, and acquainted him that he had taken John Gavan, and proposed removing him to Dublin on the following day; and he required Malone to give his aid, and that of some of the police under his command, in escorting him (Dudley) and the prisoner part of the way to Roscreá. Malone declined to do this; but told Dudley, that, if any person should attempt to molest him in the execution of the said writ, in the town of Borrisokane, he (Malone) would prevent him from being ill-treated; but, with respect to the said Gavan, it was impossible for him (Malone) to lend him any assistance in escorting him to Roscrea: and assigned for a reason (as the fact was) that he was under three several recognizances to appear at the sessions at Nenagh, and prosecute at the said sessions five persons for riots and assaults; and also, that he had no opportunity of consulting with the inspector-general as to giving an escort. In refusing his aid in the manner above stated, the appellant Malone acted in conformity to a communication received by him from the appellant Miller, to whom he had transmitted the said copy of the writ and notice, and which communication the appellant Miller made to him in pursuance of instructions from the Irish government to the effect that the chief constable might decline compliance with the said notice.

On the 13th January, 1836, both appellants were served with an order of the court of Exchequer, purporting to be dated the 11th of that month, and to be made at the instance of the respondent, upon the affidavit of Robert Dudley, for an attachment against the said Malone for his contempt, in refusing to aid the said Robert Dudley, unless cause should be shewn to the contrary; and that the appellant William Miller should answer the matters of the said affidavit. The appellants accordingly filed affidavits, disclosing the matters above stated, and shewed cause

against the said order on the 29th and 30th January, 1836; and the said court, on the 1st February, made the order of that date, as above stated. 1838. MILLER v. KNOX.

From this order there was an appeal to the House of Lords. The case was argued on the part of the appellants, by *Jackson*, Serjeant, and *Pemberton*; and on the part of the respondents, by *The Attorney* and *Solicitor-General*.

The opinion of the judges was requested on the following questions:—

1. Have the persons named in such writ, and charged with the execution of it, a right, at their discretion, to require the assistance of any of the liege subjects of the crown to aid and assist in the execution of the writ? First question.

2. Have such persons such a right upon reasonable apprehension of resistance to the execution of the writ, no actual resistance having taken place? Second question.

3. Have such persons such a right as against persons appointed and acting as constables in Ireland, under the act 3 Geo. 4, c. 103? Third question.

4. Have such persons such a right as against persons so appointed and acting under the 3 Geo. 4, c. 103, there having been a regulation made in the manner pointed out by that act, in the words following?—The men will on no account interfere in the execution of any writ, decree, or civil order, or in driving for rent, tithe, or taxes, unless called out by a magistrate or the high or sub-sheriff in person, and they will then only consider it their duty to protect those persons in the execution of their office; excepting in the execution of any process directed to them for levying the amount of any recognizance forfeited to his majesty, his heirs and successors, or of any fines imposed on any jurors, witnesses, parties, or persons at any Assizes or commission of oyer and terminer, or gaol delivery, or Fourth question.

1838.

MILLER v. KNOX.

session of the peace, in the county in and for which such constable shall be appointed pursuant to the act 3 Geo. 4, c. 103, s. 7:—constables are not to be employed in revenue duty unless when specially ordered.

Fifth question.

5. Suppose a stranger to the proceedings in the cause, but liable to be called upon to assist in the execution of a writ of rebellion, regularly called upon to render such assistance, and declining so to do, can the court out of which such writ issued commit such person as guilty of a contempt of such court?

TINDAL, C. J., delivered the unanimous opinion of all the judges who had assisted in the argument, upon the first four questions (*a*). Upon the fifth question, there was a difference of opinion, and therefore their lordships delivered their opinions upon that question seriatum.

First question.

TINDAL, C. J.—In answer to the first question proposed by your lordships to her majesty's judges, we are all of opinion that the persons named as commissioners in the writ of rebellion, and charged with the execution thereof, have not the right, arbitrarily, and under every state of circumstances, to require the assistance of the liege subjects of the crown; but we are, at the same time, also of opinion, that, when circumstances render assistance necessary for the due execution of their commission, they have the right, by law, to require assistance from the liege subjects of the crown, to such an extent as is necessary to insure the execution of the writ; due regard being had in each case to

(*a*) The judges who were present at the argument were—Tindal, C. J., Park, J., Littledale, J., Parke, B, Bolland, B., Bosanquet, J., Patteson, J., and Williams, J.

Of these, Mr. Justice Littledale and Mr. Justice Bosanquet alone expressed opinions adverse to the power of the court out of which the writ of rebellion issued to attach for contempt parties refusing to aid in the execution thereof: all the other learned judges concurring in the opinion that the court had such power.

the condition of life, description, and ability, of the persons called upon to render assistance, the numbers required to assist, and the extent of the service required from them. And we think this follows as a necessary consequence from the consideration of the process itself, and from the close and direct analogy which subsists between the duty of sheriffs in the execution of process directed to them by the superior courts of Westminster Hall, and that of the officers named in the writ of rebellion.

The commission of rebellion is a process directed to commissioners, nominated indeed by the plaintiff in the suit, but appointed by the court, under the authority of the broad seal of the court: so that, whoever they may be by name, or of whatever description or situation in life, they are, in the eye of the law, the commissioners of the court itself. And that they are so considered, appears from the reason which is assigned by Chief Baron Gilbert for directing this process to commissioners under the broad seal, and not to the sheriff; viz. "because the sheriff cannot be supposed to execute all such process in person, and it may be inconvenient to trust so great a power with the deputies of the sheriff's nomination; and therefore this court appoints its own commissioners, who are intrusted to do every thing very carefully, and are answerable to the court for their miscarriages"—Gilbert, Forum Romanum, cap. 5.

The commission, therefore, confers upon the persons named in it authorities and powers as large in degree, and, with respect to their local extent, larger than those with which sheriffs are invested under ordinary writs of execution. In the first place, the commissioners are commanded by the writ, "to omit not by reason of any liberty, but to enter the same, and the said persons, wherever they shall be found within the kingdom of Ireland, as rebels and contemners of the laws to attach them, or cause them

1838.

MILLER v. KNOX.

to be attached, so that they may have their bodies before the Chancellor, &c., on a certain day." Whether, therefore, it be in the nature of criminal process, as it seems to be—for it is laid down as undoubted law, that the commissioners may break open the doors of a house in order to apprehend the party, and the writ may be executed on a Sunday, which it is allowed the sheriff cannot do under an ordinary capias ad satisfaciendum (see Dalton, Office of Sheriffs, 353; Crompt. Auth. des Courtes, 47,) or whether it be civil process only, it confers upon the commissioners authority and power at the very least as large as sheriffs derive from writs of the superior courts. But the authority of the commissioners is not limited, as is the authority of the sheriff in an ordinary writ of execution, to the boundary of one particular county: it extends over all the counties of the kingdom. In whatever part of the kingdom the party who has been proclaimed a rebel can be found, the commissioners are commanded, and have authority, to apprehend him, and to bring him into court on the day appointed.

It is further to be observed, that the commission contains within it the clause of assistance, which is not to be found in a writ of execution; viz. "We also command all other our officers ministerial, and other liege subjects whatsoever, that, in the execution of the premises, they be aiding and assisting as it behoveth them, on the peril incumbent." The sheriff, indeed, has no occasion for such a mandate in every writ, inasmuch as he receives a patent of assistance under the great seal, with his patent of office, directed to "all archbishops, bishops, dukes, earls, barons, knights, freemen, and all others of the county, who are thereby required to be present, aiding and assisting him in all that pertains to his office." See the form in Dalton's Office of Sheriff, cap. 1. And indeed the sheriff would seem to have this power at common law—2 Inst.

194. But the reason for the insertion of such a mandate in the commission of rebellion, is, that the commissioners are not known as regular officers of the law, and may therefore require such an authority to place them upon the same footing with sheriffs—the ordinary officers of the courts. The commissioners are therefore, by the insertion of this mandate of assistance, placed at least upon an equal footing with the sheriff, and may be considered as having the same power under the writ as if it had been directed to the sheriff, to whom, according to the authority of Lord Chief Baron Comyns, the writ may be directed by the court, instead of the commissioners named by the party—Comyns's Digest, *Chancery*, (D. 5.)

Taking, therefore, the commissioners, when acting in execution of this process, to be, in effect, sheriffs in each and every county of the kingdom, the question becomes this—what authority has the sheriff as to the posse comitatûs in the execution of a writ? for, by a direct analogy, the commissioners must possess at least the same. Now, according to the authority of the books, the sheriff is armed with the power of the county, because "Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud," as was observed by the court in *Foljambe's* case, 5 Rep. 115. b. And Dalton lays it down more at large, that "the sheriff or his undersheriff, or bailiff, &c., may (nay, ought, if need be) to take the power of the county (scilicet, what number of persons they shall think good,) to aid him or them to execute in every behalf the king's process or writ, be it by a writ of execution, replevin, capias, &c., or any other writ, it being the king's commandment. And such as shall not assist the sheriff &c. therein, being required, shall pay a fine to the king"—Dalton's Sheriff, 354. And further, by the same authority, p. 355, it appears "that, when the sheriff may take the posse comitatûs, he may make proclamation commanding all persons (meet) to come

1838.

MILLER v. KNOX.

and go with him, and to aid him;" and, again, "in such cases they are not appointed any number, but it is referred to the discretion of the sheriffs &c. what number they will have to attend upon them, and how and in what manner they shall be armed, weaponed, or otherwise furnished."

One of the earliest authorities on this subject is in the Year Book, 3 Hen. 7, 1, where it was held that an indictment would not lie against a bailiff for taking three hundred men in arms to execute a replevin, nor against those who accompanied him; "for, every one is bound to assist the sheriff, and to maintain him in his office in the execution of writs; (for it is the commandment of the king); and the bailiff has the same authority as his master; and every one is bound to aid them in their business; and that by the common law and common reason, notwithstanding the statute of Westminster 1, and Westminster 2; and also every man is sworn to be aiding the sheriff in his business; and if they do not do it at the request of the sheriff, they shall make fine: as, if he require them to take felons, and they refuse, so shall they in that case." And when it was argued by the king's serjeants that the sheriff had no right to take so many men with him, but a reasonable company, it was answered (which must mean by the court) "that he might be in great peril and jeopardy of his life, and for this reason he shall take with him as many as he pleases at his own discretion." And when it was argued that the statute of Westminster 2, c. 39, says, that, "post querimoniam factam, he shall take the power of the county, and not before," it was holden that he may by the common law.

This antient case forms the principal ground-work upon which the law on this subject has been laid down by text-writers and others, though with some difference of language—See 2 Inst. 693; 3 Inst. 16; Dalton's Office of

Sheriff, c. 95; Bro. Abr., *Fine pur Contempts*, 37, *Trespas*, 266; Vin. Abr., *Sheriff*; and Comyns's Digest, tit. *Viscount*. Upon the ground, therefore, that, under these authorities, the sheriff is armed with such power in the execution of writs directed to him, we think the commissioners have the power to call on such persons as are of proper age, and able, and fit to travel, to assist them in the execution of the commission within the county in which they may be; exercising a sound discretion, whether, upon the particular occasion, such aid is necessary, and what numbers the particular occasion may require; and that all persons answering such description, having a reasonable and timely summons and notice for that purpose from such public officers, are bound to attend to it, and punishable for a wilful disobedience thereof.

Second question.

In answer to the second question proposed to us, we are all of opinion that the commissioners have a right to the assistance of the liege subjects in the execution of the commission, upon a reasonable apprehension of resistance, although no actual resistance has taken place; or, in other words, that it is not essential to the exercise of this power, that a breach of the peace should have been actually committed, or an attempt to execute the process be first made by the officers, and resistance ensue, before they are entitled to call for assistance. There might, indeed, have been some ground for such contention, if the sheriff's authority to call for aid had depended upon the statutes of Westminster 1 and 2; but, as it has been expressly ruled that such statute is in affirmance of the common law, it is alike consonant to law and reason that previous resistance should not be considered necessary as a foundation for the exercise of the power. And, therefore, if there be a show of intended resistance; if it be clear, from the surrounding circumstances, to a reasonable man, that force and numbers will be used to oppose the execution of the process, either by rescuing or protecting the defendant, and that

1838.

MILLER v. KNOX.

such assistance is absolutely necessary to put down such intended resistance; we conceive this is, from the nature of the thing, such resistance as is pointed at and intended by the text-writers above referred to. To hold otherwise, would be to expose the lives of the officers to imminent peril; and the object of the writ might be defeated by the removal of the defendant. And indeed, in many of the instances put by Dalton, in his ninety-fifth chapter, in which the sheriff is stated to have authority to call out the posse comitatûs, actual resistance cannot, from the nature of the case, be supposed to have taken place previously to his calling for aid; but the object of such summoning of assistance is manifestly to prevent resistance, by shewing that it would be hopeless.

Third question.

In answer to the question thirdly above proposed to us, we are all of opinion that the commissioners appointed by the writ have the right to require the assistance of persons appointed and acting as constables in Ireland under the statute 3 Geo. 4, c. 103.

The persons so appointed cannot be less liable, by reason of such their appointment, than other liege subjects; and, besides this view of the question, they may perhaps be considered as falling within the description contained in the writ, of ministerial officers of the king; in which point of view they would be the first class of persons to whom application should be made. And, indeed, looking to their usual employment, and their freedom from the ordinary occupations of life, they are, of all others, the very persons to whom the commissioners might most reasonably apply in the first instance for assistance.

Fourth question.

In answer to the fourth question proposed by your lordships, we agree in thinking that the commissioners have the right to require the assistance of persons appointed as constables under 3 Geo. 4, c. 103, notwithstanding the regulation particularly set forth in the said question has been made in the manner pointed out by that sta-

tute. Because we think it was neither the effect nor the intention of that statute to enable any order to be made which should diminish or abridge the common law duties of a constable, or take away any responsibility where it has attached by the common law. There is nothing in the act which points to such an alteration in the liability of a constable. It was an act passed, as appears by the preamble, to establish a new and more effective system for the appointment and regulation of constables throughout Ireland. The 12th section authorises the inspectors appointed under it, with the consent and approbation of the lord-lieutenant, to frame rules, orders, and regulations, "for the conduct and proceedings of the constables," from time to time. To direct the constables in the due and orderly performance of their duty, to point out to them the manner in which it would be best performed, not to alter the limits and extent of their duty, was the intention of the legislature. And the direction given in section 6, which applies, if any does, to this case, does not in any manner militate against this construction; for, it says no more than the law would have itself said, in directing them not voluntarily to mix themselves up with the execution of civil process. But, if the duty of aiding the sheriff in the posse comitatûs, or the duty of aiding the commissioners in the execution of a writ of rebellion, is cast upon them as liege subjects not less than as constables, there is nothing in that order which can have the effect of absolving them, nor is any authority given by the statute to absolve them, from the performance of such their common law duty.

Fifth question.

WILLIAMS, J.—My lords, the fifth question proposed by your lordships, to which alone it is necessary that I should address myself, is, "whether, supposing a stranger to the proceedings in the cause, but liable to be called upon to assist in the execution of a writ of rebellion, be

1838.

MILLER v. KNOX.

regularly called upon to render such assistance, and decline to do so, the court out of which such writ issued can commit such person as guilty of a contempt of such court;" or, in other words, whether a writ of attachment may issue against such person: and I understand the question to be confined to the authority and competence of the court, and to that only.

Now, that the superior courts of record, especially, have been in the habit of issuing such process, is past a doubt. No question of that kind was attempted to be raised at the bar. Of its antiquity also, I presume, there is as little doubt. "The issuing of attachments by the supreme courts of Westminster Hall for contempts out of court," (as is observed by Lord Chief Justice Wilmot in his prepared but not delivered judgment, in the case of *Rex* v. *Almon*, Wilmot's Notes, 254), stands upon the same immemorial usage as supports the whole fabric of the common law. It is as much the lex terræ, and within the exception of Magna Charta, as the issuing any other legal process whatsoever."

Again, I shall not waste your lordships' time by discussing whether the court of Exchequer in Ireland stands upon the same footing as those before alluded to. This, also, was not disputed in argument at the bar.

Lastly, I shall assume that the writ of rebellion was *process* lawfully issuing in the king's name by the authority of the court; because, although much observation and criticism were employed upon the nature and quality of the writ, *that* was not denied.

The question, therefore, resolves itself into this point, whether, in the case supposed, an attachment can legally issue; or whether indictment be not the appropriate and *only* remedy. And, in considering this point, in the absence of any precise authority, we are driven (as in so many instances must be the case,) to analogy; and therein to ascertain whether this process has been resorted to on

occasions not distinguishable from the present; because this ancient principle, as in the language of a late Chief Justice I have described it to be, has not been a barren theory, but has been frequently and variously resorted to.

In Viner's Abridgment, title *Contempt*, (A.), it is defined or described to be, "a disobedience to the court, or an opposing or a despising the authority, justice, or dignity thereof. It commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required, by the *process*, order, or decree of the court."

Hawkins, in book 2. chapter 22, "Of Attachment," observes, that "it is properly grantable in cases of contempt, against which, for the most part, all courts of record generally, but more especially those of Westminster Hall, and above all, the court of King's Bench, may proceed in a summary manner *according to their discretion*." Now, I would by no means intimate an opinion that the learned writer, by the latter general expressions, meant to assert that the power of the courts is perfectly arbitrary and indefinite; but I do think he must be understood as describing this power not to be precisely limited and fixed, but that it may be extended to new cases as they arise, provided they be within the principle of those in which the power has been decided to exist. The subject is pursued with much minuteness in the book I have referred to, though it is truly remarked, "that all the particular instances of contempts, it would be endless to enumerate."

With one class, however, and that not a small one, I shall not trouble your lordships. I allude to attachments against sheriffs, gaolers, attornies, and others, as to whom a distinction may be drawn—that, inasmuch as they are to be considered ministers or servants of the court, they may especially be subjected to an immediate and summary control. But, after examining cases of that description, Hawkins comes to consider "where persons (generally)

1838.

MILLER v. KNOX.

are punishable in this manner for contempt of the king's writs;" and, upon this point, there is the following passage: "It seems that it may reasonably be argued, that all such writs, being in the king's name, and importing some lawful command or prohibition from him, which every subject is in duty bound to obey, every disobedience of them, being a contempt of the king's authority, is in strictness punishable in the manner above mentioned, if the court in its discretion" (*discretion* again) "shall think fit so to proceed: yet it doth not seem to be *usual* for the court to proceed in this manner for a bare non-feasance in not performing the command of the first writ in any case whatsoever." I have, of course, given the passage entire: the distinction, however, contained in the last clause does not seem to respect the *power* of the court so much as the ordinary course and *practice*; whereas I consider my present concern to be with what the courts *can* "in strictness" do, and not what it may be usual or expedient, and so forth, for them to do. And, even understanding the latter clause in the sense above attributed to it, I think it will presently appear to be not quite consistent with the author's usual accuracy.

I shall now advert to some of the cases in which this process has issued. In an *Anonymous* case, 1 Salk. 84, an attachment was granted at once against a party upon whom a rule of court was served; upon which occasion he uttered some vulgar expressions concerning it. I am aware that an attempt may be made to explain this case, as coming under the acknowledged head of contempt—"speaking contemptuous words of the court;" which, being considered to be an impeachment of and an attack upon its authority, is supposed to require immediate interposition and correction. And, supposing this to be the true solution of the principle upon which the attachment was granted, it must be admitted that the case has less bearing upon the present than if the real ground for holding it to

be a contempt was the disobedience of the order or rule of court. But, however that may be, that there are cases in abundance which rest absolutely and exclusively upon the latter principle, will be seen presently. In this case, however, which is constantly referred to, and its legality, I believe, never questioned, the attachment was awarded against the party, *unheard*, as I have before noticed. In a very recent case, *Gobbey* v. *Dewes*, 10 Bing. 112, 3 M. & Sc. 556, the court of Common Pleas granted an attachment *in the first instance*, against certain persons concerned in a rescue, although the return stated that the rescue had been out of the custody of a bailiff, and not of the sheriff himself—the application being founded solely upon that return.

What weighs with me, however, most strongly, is, the long continued and undoubted practice, of issuing attachments for disobedience of writs of subpœna, whether comming from the crown office or taken out, as it is of course in a civil suit. And yet it is undeniable, that, in the latter instance, it is merely a private remedy resorted to by a private party to enforce or resist a claim wholly unconnected with any public concern or interest whatsoever. And, moreover, this summary interference might appear, and has actually been urged to be, the less requisite, and therefore by more objectionable, because there is another remedy, by express statutory provision, for the party aggrieved by the non-compliance with the exigency of the writ. But this notwithstanding, against persons not officers or ministers of the courts (mere private parties), attachments have been awarded in more instances than it would be possible to enumerate, and from which I must make a selection.

In the case of *Wyatt* v. *Wingford*, 2 Ld. Raym. 1528, an attachment was moved for against a witness for not attending at the Assizes to give evidence in pursuance to a subpœna: cause was shewn, and it was urged that the party had his remedy (before adverted to) by action on

1838.

MILLER v. KNOX.

cess, order, or decree of the court. Sometimes it arises by one or more; their opposing or disturbing the execution or service of the process of the court, or using force to the party that serves it; sometimes by using words importing scorn, reproach, or diminution of the court, its process, orders, officers, or ministers, upon executing or serving such process or orders. It is also a contempt to abuse the process of the court by wilfully doing any wrong in executing it, or making use of it as a handle to do wrong, or to do any thing under color or pretence of process or authority of the court without such process or authority." And the punishment is added. "For any direct and positive contempt a party may not only be taken into custody, but committed to the Fleet during the pleasure of the the court. But, for a bare contempt in not doing somewhat, then only till he obey and perform: for, a contempt in doing somewhat against the order of the court, is accounted much greater than omitting to do somewhat commanded, seeing the one is wilful, the other not always so; and besides, what is only not done may be done; but what is once done cannot be undone, though its effects may often be made to cease, or reparation may be made."

I cite these passages, because they appear to me afford a complete answer to one objection which was urged at your lordships' bar, namely, that process of contempt cannot be issued for a bare non-feasance. That it may be so issued, is here expressly stated; and, in conformity therewith, it is the uniform practice to proceed by process of contempt against witnesses for not attending in pursuance of a writ of subpœna; against parties for non-performance of awards; for not appearing, or not putting in answers; and numberless other bare non-feasances. And, although several cases were cited in support of this objection, yet in none of them is any doubt thrown upon the power and authority of the court; but they turn upon the question, whether the court, under the particular circumstances of

1838.

MILLER v. KNOX.

each case, will, in their discretion, exercise such power and authority. I cannot, therefore, entertain any doubt, but that process of contempt may be issued against any person who has barely omitted to do what he is commanded or required to do by the process of the court. It follows, that, in order to fix a person under the circumstances stated in your lordships' question, as guilty of a contempt of court, it will be sufficient to shew that he is commanded or required by the process of the court to render that assistance in its execution which he has declined to do.

Now, as the person supposed is a stranger to the proceedings in the cause, and is not one of the persons to whom the writ, or rather commission of rebellion, is addressed by name (which the *very* form of the question implies), he is not in the predicament in which persons usually are in respect to whose conduct questions of contempt have arisen; that is, he is not personally and directly called upon, in the first instance, by the process of the court, to do any act. The process does not, upon the face of it, necessarily convey to him any command or requisition. It does, however, contain a clause commanding all the queen's liege subjects whatsoever to be aiding and assisting in the execution of the premises, as it behoveth them, upon the peril incumbent. The person supposed in your lordships' question, is one of those liege subjects, none of whom are particularly named in the process; the question assumes that it behoved him to render assistance, and that he was regularly called upon to do so: the conclusion necessarily follows, in my mind, that he is commanded and required by the process to render that assistance, just as much as if his name were actually inserted in it; and his refusal to do so is as much a contempt of the court as if he had been one of the commissioners, and had neglected to execute the process.

I have come to this conclusion, upon a conviction that

1838.

MILLER v. KNOX.

the power which the court exercises of punishing by process of contempt those who, being bound to obey, nevertheless disobey its process, orders, or decrees, is inherent in the court by the common law of the land, for the due support of its authority and dignity, and does not depend upon any statute.

I am aware that it has been argued that the mode of proceeding by attachment took its rise from the statute of Westminster 2, c. 39; that, as that statute speaks only of *assisters*, *aiders*, *consenters*, *commanders*, and *favourers*, who are to be attached by a writ judicial, no other persons can be so attached in respect of any thing done or omitted in the execution of process directed to the sheriff; and that the same law applies to process of rebellion directed to commissioners. I agree entirely that the same law does apply; and that process of contempt will not lie against persons refusing to assist commissioners of rebellion, unless it would also lie against persons refusing to assist the sheriff; the only difference, as I apprehend, being, that, in a commission of rebellion, the command to all liege subjects to be aiding and assisting is expressly inserted, which is not the case in writs directed to the sheriff: the reason of which appears to be, that, as the authority of the commissioners of rebellion is confined to that particular process, unless such command were expressly inserted, they could not call upon any one to assist, having no general authority whatever; whereas, the sheriff has such general authority at common law to take the posse comitatûs, and also by the writ of assistance which is given to him together with his patent. I am of opinion, however, for the reasons already given, that process of contempt will lie against all persons who refuse to assist the sheriff in the execution of the process of the court when lawfully called upon so to do, because the process becomes then in effect addressed to them.

It was observed, in the course of the argument, that it

is strange that no clause of assistance is inserted either in the writ which precedes, or in that which follows the commission of rebellion. As to that which precedes, the answer is, that it is addressed to the sheriff, who has general authority to command assistance; as to that which follows, namely, the sequestration (for it seems that there is not any process to the serjeant-at-arms—Forum Romanum, p. 77—I cannot find any reason assigned for the omission of such a clause. However, it does not seem that such omission can in any way prevent the operation of it in the commission of rebellion, in which it is inserted.

With respect to the statute of Westminster, Lord Coke, in his commentary on it, in 2 Inst. 453, and also 193, states it to be in affirmance of the common law, and cites Bracton to that effect. But, whether that be so or not, I confess that I cannot but agree with my Lord Chief Justice Wilmot, who, in his proposed judgment in *Rex* v. *Almon*, Wilmot's Opinions, 254, says—"Indeed, when that act of parliament is read, it is impossible to draw the commencement of such a proceeding out of it: it impowers the sheriff to imprison persons resisting process; but has no more to do with giving courts of justice a power to vindicate their own dignity, than any other chapter in that act of parliament." It seems to be understood that at all times the court had power to punish disobedience to its process, orders, and decrees, by process of contempt; and there is nothing in the statute of Westminster 2 which can in any way be construed to give any such power. I am, therefore, quite at a loss to see why such power should be supposed to have originated in, or should be in any way referred to that statute. So far as regards the punishment of persons who resist and obstruct the execution of process, that statute may possibly be supposed to have given rise to the process of attachment, which is now commonly resorted to; *Gobbey* v. *Dewes*, 10 Bing. 112, 3 M. & Sc. 556; but, as regards the punishment of those to whom

1838.

MILLER v. KNOX,

the process is addressed, whether by name or generally, and who, being bound to execute or assist in executing that process, refuse so to do, in contempt of the court, the statute seems to be wholly irrelevant.

It does not appear that this question has ever been brought into discussion before any court, and expressly decided; at least, no authority to that effect, on one side or the other, was cited at your lordships' bar; nor have I been able to discover any; nor is it stated, either in Gilbert's Forum Romanum, or any other book of which I am aware, giving an account of the commission of rebellion, nor in Dalton's Sheriff, or other book respecting the sheriff's power of taking the posse commitatûs, that it is the proper mode of punishing those who refuse to render assistance when legally called on so to do. Doubtless such disobedience may, in many, if not in all cases, be punishable by indictment; but I apprehend that this circumstance does not in any degree derogate from the power which the court has of punishing by process of contempt, though it may in many instances furnish a reason why the court, in the exercise of its discretion, may think fit not to exert that power.

It is indeed, stated in Brooke's Abridgment, title, *Fine pur Contempt*, pl. 37, "That, if the sheriff or his bailiff have a writ, every man is bound to aid them in their wants (besoigns), and this by the common law; and if they do it not, at the request of the sheriff, they shall make fine: as, if the sheriff require them to take a felon, and they refuse, they shall make fine:" and the Year Book, 3 Hen. 7, 1, is cited. Also, in the same Abridgment, title *Trespass*, pl. 266, the same law is laid down, and the same authority cited; and also in title *Riots*, pl. 2. Lord Coke, also, in his commentary on the statute of Westminster 1, c. 17, 2 Inst. 193, says, that every man is bound at common law to assist the sheriff; and, if they do it not, being required, they shall be fined and imprisoned. It is not, however,

stated in these passages how the fine and imprisonment are to be imposed; and, as regards any refusal to arrest a felon, probably it must be by indictment; for, in such case, there would be no process of court, and therefore no contempt. But, in the case of refusal to assist in executing process of the court, it would be otherwise; and the passage being found in Brooke's Abridgment under the head of *Fine pur Contempt*, seems to indicate that a contempt would be incurred, which is of course punishable by attachment.

Upon the whole, therefore, with sincere respect for the opinion of those of my learned brothers from whom I have the misfortune to differ, my answer to your lordships' fifth question is, that the court may commit a person under the circumstances stated in that question, as guilty of a contempt of court.

BOSANQUET, J.—Upon the first four questions proposed by your lordships to the judges, I concur with the rest of my learned brothers in the answers given in the names of all the judges by my Lord Chief Justice, and in substance with the reasons assigned for those answers. But, having the misfortune to differ from the majority of my learned brothers upon the answer to be given to the fifth question, I proceed with great diffidence to offer to the House the reasons upon which my opinion, with respect to the important principle which it involves, is founded.

Fifth question.

The fifth question is this, "Suppose a stranger to the proceedings in the cause, but liable to be called upon to assist in the execution of a writ of rebellion, regularly called upon to render such assistance, and declining so to do, can the court out of which such writ issued commit such a person as guilty of a contempt of such court?"

The substance of the question is, whether a mere refusal by a stranger to assist the commissioners, upon re-

1838.

MILLER v. KNOX.

quest, be a misdemeanour, punishable by indictment or information, or a contempt of court, punishable by attachment, and, consequently, by imprisonment without trial. Such person may be liable to punishment by indictment or information for a breach of duty cast upon him by law; but it does not follow that he is liable to be attached for a contempt of court.

A contempt, it is said in the Practical Register, p. 135, is, "a disobedience to the court, or an opposing or despising the authority, justice, or dignity thereof. It commonly consists in a party doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of the court. Sometimes it arises by one or more; their opposing or disturbing the execution or service of the process of the court, or using force to the party that serves it; sometimes by using words importing scorn, reproach, or diminution of the court, its *process*, orders, officers, or ministers, upon executing or serving such process or orders."

The commission or writ of rebellion is not addressed, either personally, or by any general description, to the person supposed to be called upon to assist the commissioners: it is addressed to the commissioners only.

If a stranger aid or abet the defendant in his endeavour to evade the execution of the process of the court, there is no doubt that he may be punished by attachment, his conduct in such case being a clear contempt of the court. A stranger who by contrivance defeats the party of the benefit of an award made under a rule of court, is guilty of a contempt, for which he shall be attached; for which I would refer to Sir *James Butler's* case, 2 Salk. 596.

The duty imposed upon a stranger who is required to assist a commissioner, may be admitted to be analogous to that which every liege subject is bound to render to the sheriff in the execution of the king's writ. But I am not aware that a mere refusal to aid the sheriff in the execu-

tion of civil process by a private person, a stranger to the writ, has ever been visited by attachment. It may be admitted that the right of the sheriff to call for such assistance is a right at common law; and that the statutes of Marlbridge, and of the 1st and 2nd of Westminster, are only declaratory of the common law; but neither the language of the statutes, nor antient usage, shews that a mere refusal subjects the party refusing to attachment.

The case of *The King* v. *White*, which has been cited from the Reports tempore Hardwicke, stands upon very different grounds. In that case, the warrant of the Chief Justice of the King's Bench to arrest a felon, was directed to all constables throughout England; and an attachment was moved for against the defendants, constables of Scarborough, for not obeying the warrant. The practice, in such cases, is, to address the warrant to all chief and petty constables, and all others whom it may concern. The court say: "The judges of this court have power to grant warrants to be executed by all constables &c. throughout England; and disobedience to a judge's warrant is a contempt of the court—such a contempt as the court will take notice of by way of attachment." The persons spoken of were officers whose special duty it is to arrest felons, and the writ was addressed to them, though not nominatim, yet, by a description which made it an order of the Chief Justice of the King's Bench upon them; in which respect the case differs essentially from the case of a writ directed to a sheriff, who, by virtue of the authority of his office, as such, requires assistance from some one or more of the king's subjects.

A subpœna to attend as a witness in a cause, is a personal order, and imports that the individual therein named is connected with the cause by his personal acquaintance with the matters involved in it. Not so where the command is general upon all liege subjects, and the call is made upon a stranger by a commissioner or other officer

1838.

MILLER v. KNOX.

of the court. Unless, therefore, the practice of visiting by attachment a refusal to comply with a request of the commissioner be sanctioned by the authority of text-writers, by judicial decisions, or by antient usage, I think that it cannot be deemed a legal practice.

Some instances, in matters of revenue, have occurred, in which rules for attachments have been granted by the court of Exchequer against constables for refusing to render assistance to officers of the customs in seizing uncustomed goods, pursuant to the requisition contained in writs of assistance; in one of which cases the rule was made absolute. These writs, which were issued by the court of Exchequer, pursuant to the statute 13 & 14 Car. 2, c. 11, s. 5, since repealed by 6 Geo. 4, c. 106, but re-enacted by 6 Geo. 4, c. 108, ss. 41, 42, were addressed to all mayors, constables, and other officers; and, after reciting the commission granted to the commissioners of the customs, under the great seal, commanded all such mayors, constables, and other officers, to aid and assist the commissioners and officers of the customs in the execution of their office. The 13 & 14 Car. 2, c. 11, s. 5, provides that it shall be lawful for any person authorised by writ of *assistance under the seal of his majesty's court of Exchequer*, to take a constable, headborough, or other public officer inhabiting near unto the place, and in the day-time, to enter any house, shop, &c., and, in case of resistance, to break open doors, and seize uncustomed goods &c. And by section 32, all officers of the admiralty, &c., and also all justices of the peace, mayors, sheriff, bailiffs, constables, and headboroughs, and all the king's majesty's officers, ministers, and subjects whom it may concern, shall be aiding and assisting all officers of the customs, and their deputies, in every thing by the act enjoined, in the execution thereof; and shall be defended and saved harmless.

Such cases can afford little analogy to the case of civil process in a suit between party and party, the only object

1838.

MILLER v. KNOX.

of which is to compel an appearance in a private suit, though the proceedings assume a criminal form, the neglect to appear being treated as a contempt. The writs issued out of the court of Exchequer, directed to public officers, commanding them to assist in the collection of the king's revenue, bear a strong resemblance to the warrants issued by the court of King's Bench, directed to public officers, commanding them to arrest felons; and I can well understand how disobedience to such writs or warrants, when duly served on, or notified to, any of the persons to whom they are directed, may be deemed a contempt of the court authorised by law to issue the command. It may be observed, however, that, in the only case in which the rule for an attachment appears to have been made absolute, *The King* v. *Barton Miles*, on the 21st January, 1733, the constable not only absolutely refused to assist, but spoke contemptuously of the process, telling the custom-house officer that he valued not his writ of assistance, nor would pay any obedience to it. In the case of *The King* v. *Kelynach*, on the 15th November, 1768, the constable having looked at the writ, refused to go or give any assistance, declaring that the writ was good for nothing. What became of this case does not appear. In the last case, where a high constable made a public acknowledgment of his offence, and paid the costs, *The King* v. *Roskinge*, on the 20th of June, 1817, the high constable was out hunting, and refused to go unless a 1*l.* note was given him. In the first of these cases, the motion was made by the Attorney-General, and in the two others by counsel for the crown, against certain public officers specified in the statute, who are expressly made liable thereby to obey writs of assistance under the seal of the Exchequer.

There might also be ground for contending in the first case, if not in the others also, that the parties had not merely refused to obey the command of the writ, but treated the process with contempt; and, in the last, that

1838.

MILLER v. KNOX.

the officer had attempted to extort a fee to which he was not entitled. A mere refusal to assist upon request, does not necessarily import any denial of the validity of the process, or disrespect to the court from which it issues, since it is quite possible that the refusal may be founded upon some legal excuse. Accordingly, it appears upon inquiry, that, where mayors, and other officers in some other cases, have refused to render assistance to officers of the customs, upon being required so to do by virtue of writs of assistance, the Attorney-General, instead of moving for attachments in the court of Exchequer, has filed informations in the court of King's Bench; such are *The King* v. *The Mayor and Constables of Gloucester*, Hilary Term, 55 Geo. 3, *The King* v. *Weaver and Another*, Easter Term, 55 Geo. 3, *The King* v. *Macklean, Headborough*, Easter Term, 57 Geo. 3. For, the court of King's Bench will not punish by attachment a public officer for a breach of duty, though such duty is imposed upon him by process of law, unless the offence amounts to a contempt of that court. Thus, in the *Gaoler of Shrewsbury's* case, 1 Str. 532—9 Geo. 2, where the Attorney-General moved for an attachment against him for a voluntary escape of one in execution for obstructing an excise officer in the execution of his office, the court refused to grant it, there being no precedent for that purpose; but they ordered him to shew cause why there should not be an information. And, in another case, where a rule for an attachment against a sheriff for neglecting to take a replevin-bond, was obtained, it was answered, that such an attachment was never granted before; that the party injured might maintain an action; and it could not be construed to be an abuse of the process of the court, or a contempt; which, it was urged, were the sole grounds of an attachment: and the court, being of that opinion, discharged the rule—*The King* v. *Lewis*, 2 T. R. 617.

It is clear, however, that, wherever an officer neglects a duty incumbent on him, either by common law or sta-

tute, he is for his default indictable. It was so held by the Queen's Bench in *The Queen* v. *Wyatt*, 1 Salk. 380, and in *Coleman's* Case, 2 Rol. Rep. 78, where Coleman and others, constables of Chichester, were held indictable for refusing to execute the warrant of a justice of the peace directed to them to apprehend one for a contempt; the constable being the proper officer of a justice of the peace.

Lord Chief Baron Gilbert, in his History of the Common Pleas, p. 25, has surmised that the power of the superior courts of law to punish contempts of their process by attachment, was founded on the statute of Westminster 2. This is denied by Sir Eardly Wilmot, in the case of *The King* v. *Almon*, Wilmot's Opinions, 253, in which he says, "that the right of those courts to issue attachments is coeval with the common law; that it is founded *on immemorial usage in particular cases;* and is as much a part of the law of the land as trial by jury." The correctness of this latter opinion may be admitted: but the question still remains, what are those particular cases in which the punishment by attachment for contempt has been sanctioned by immemorial usage: for, no man shall be punished, as Lord Coke says, in his 2nd Institute, 454, but per legem et consuetudinem Angliæ. Gilbert says, that the courts must have as great power to attach as the sheriff: and Coke says, that the statutes of Marlbridge and Westminster are only declaratory of the common law. But, if we look to the particular cases to which the common law is so declared to apply, they do not extend beyond the acts of those who aid, abet, or favour those who resist: auxiliantes, consentientes, præcipientes, et fautores. This word fautores, Lord Coke translates "favourers," and says it is a word of large extent, and refers to the statute of Præmunire for purchasing bulls from Rome, 16 Rich. 2, c. 5, where the words are, "notaries, procurators, maintainers, abettors, fautors, and counsel-

1838.

MILLER v. KNOX.

lors," which no doubt included all who by word or deed make themselves parties to the act done. But he who merely withholds his personal assistance to apprehend an offender, without any intent to co-operate with such offender, cannot with any justice be charged criminally with aiding, abetting, or favoring him, or being particeps of his offence. If, then, immemorial usage to punish by attachment in such case, is not to be inferred from the language of these antient statutes, I ask, where is any evidence of such antient usage to be found, which, according to the language of Wilmot, is to be considered and inforced as a part of the law of the land, as much as trial by jury? It is said, indeed, by Serjeant Keble, in the Year Book, 3 Hen. 7, fol. 1, and the passage is cited in Brooke's Abridgment, *Fine pur Contempt*, 37, and *Trespass*, 266, that every man is sworn to aid the sheriff on his besoignes, and if they do it not at the request of the sheriff, they shall make fine; as, if the sheriff require them to take felons, and they refuse, they shall make fine. But this is only the argument of counsel for the defendants in an indictment for a riot, which had been preferred against persons who had accompanied the sheriff's bailiffs with great numbers in arms to execute a replevin. Whether these persons, upon refusal, would have been liable to be fined without a previous conviction, is not said, much less is it alleged that they would have been liable to an attachment. The only object of the argument was, to shew that the defendants would have been punishable if they had not attended the sheriff upon his request. The court only decided that the sheriff may lawfully take the power of the county before as well as after complaint of resistance. For any act done to obstruct the execution of the king's writ, there is no doubt that an attachment may be issued by authority of the common law; but, on account of a mere refusal to assist the sheriff, I find no authority for such a proceeding. Not

that the party refusing is dispunishable; for, upon the appointment of every sheriff, a patent of assistance is issued under the great seal, directed to archbishops and knights, freeholders, and all others of the county, reciting the appointment of the sheriff, and commanding all such persons to be aiding, answering, and assisting to the sheriff in all things which appertain to his said office. For disobedience to this writ, as well as for refusal to obey the sheriff when lawfully called upon to join the posse comitatûs, the party refusing may unquestionably be indicted. But no text writer has been referred to in support of a proceeding by *attachment* for such refusal. Nor has any judicial authority or precedent been found, except those already mentioned, where the king was party, in cases of disobedience, either to a warrant to arrest felons issued out of the court of King's Bench, or to writs of assistance in revenue maters issued out of the court of Exchequer, pursuant to the statute of Charles 2. And in no one of these was an attachment granted against any private person, or even against any officer not described in the writ.

From such cases, it cannot be inferred that any immemorial usage exists to punish by attachment the refusal by a stranger to assist the sheriff in executing a writ in a private suit between party and party, much less a refusal to aid in the execution of a commission of rebellion, which is directed to the commissioners only. It may be here observed, that, before the statute of Westminster 2, the sheriff might lawfully return resistance as an excuse for not executing the king's writ, which he is now forbidden by that statute to do. And, if he make such return now, he shall be punished, because he ought to have taken the power of the county. But there is no statute which forbids commissioners of rebellion to make a return of resistance as an excuse. And I find, that, in Easter Term, 4 Elizabeth, in a case of *Griffith* v. *Price*, such a return was made:

1838.

MILLER v. KNOX.

"The commissioners of rebellion return that the defendant locks himself up in his house. Ordered that a commission of rebellion issue to the sheriff, commanding him to use the help of the county to apprehend the defendant, and bring him to court"—Hargrave's Manuscripts, No. 170, fol. 149. Commissioners of rebellion, therefore, not being subject to the same responsibilities of sheriffs, do not require the same power.

It is remarkable that the serjeant-at-arms, the officer of the court, who is sent in case the commissioners fail to bring the party into court, is not invested with any such authority to call for assistance as that which is claimed for the commissioners. The reason of this omission may be, that the serjeant-at-arms is sent for the benefit of the defendant, to see, as Gilbert says, Forum Romanum, 77, whether the defendant really hides himself from justice, lest the commissioners, who are nominated by the plaintiff, should improperly have returned non est inventus for the purpose of enabling the plaintiff to obtain a sequestration of the defendant's lands and goods, when he might have been brought before the court. But we find, that, upon the appointment of sequestrators, in consequence of the failure of the serjeant-at-arms, no such extraordinary power is given to them; but, if resistance be offered to the sequestrators, a writ of assistance is then issued to the sheriff, by which, after reciting obstruction to the sequestrators, the sheriff is commanded to go and assist the sequestrators, and to put them into quiet and peaceable possession. Such appears to be the practice both of the courts of Chancery and of the Exchequer: *Russell* v. *Bodvil*, 1 Chancery Rep. 187—12 Car. 2; 1 Fowler's Exchequer Practice, 181.

It is not easy to understand upon what grounds the power of calling all persons to his aid, entrusted to the sheriff, a high and responsible officer of the law, could be transferred by a court of equity to private persons of its

1838.

MILLER v. KNOX.

own appointment nominated by the party in the cause; and it is still more difficult to understand why the sequestrators appointed by the court to execute the last process, should be obliged to resort to the sheriff for protection and assistance, if the commissioners named by the plaintiff in the earlier process are intended to be intrusted with all the powers of the sheriff.

Commissions of rebellion appear from Gilbert's Forum Romanum, pages 17 and 18, to have been anciently directed to the sheriff; and they may be so directed at the present time—Practical Register, 130; Com. Dig. *Chancery*, (D. 5.). Gilbert says that the commission of rebellion commanded all constables and bailiffs to assist the sheriff; and, speaking of the attachment, proclamation, and commission of rebellion—"these were all directed to public ministers and officers of justice, and plainly appeared to be the ancient prerogative process to compel appearance in the superior court of judicature." Such commissions, however, are now, and for a long time have been, usually directed to commissioners, of which there is an instance as early as Easter Term, 36 Henry 8, in Hargrave's Manuscripts, ubi supra. In a precedent in the reign of James the First, West's Symb. vol. ii. p. 185, in the edition of 1627, as well as in those contained in 1 Harrison's Chancery Practice, 289, and 1 Fowler's Practice of the Exchequer, 160, of more modern date, it will be found, that, when they are directed to commissioners, not only all mayors, constables, and liege subjects are commanded to assist the commissioners, as they were, according to Gilbert, formerly to assist the sheriff; but, in addition to the general words, mayors, constables, &c., used in the commission to the sheriff, the word "sheriffs" is introduced; so that, in whatever county the commissioners exercise their authority, the sheriff of that county is commanded to aid and assist them. From which there seems great reason to infer, that, although, for convenience, where a defendant

1838.

MILLER v. KNOX.

absconds, the commissioners are empowered to arrest the defendant in any county in which he may be found, they ought, in case of resistance, requiring the aid of the posse comitatûs, to resort to the sheriff of that county, the antient responsible officer of the crown, originally authorised to enforce the process. The effect of this course of proceeding is, to enable the same commissioners to avail themselves of the power and authority of the sheriff in every county in the kingdom, without conferring upon them such an extraordinary and unknown power as that of raising by their own authority, not merely the posse comitatûs, but the whole posse regni.

The probability of this view is much strengthened, both by the right of the commissioners to make a return of resistance as an excuse for not executing their commission, and the practice of issuing subsequent commissions of rebellion, or writs of assistance to the sheriff after resistance made either to the commissioners of rebellion or to sequestrators.

The sheriffs are ministerial officers of the court, and so are all bailiffs of franchises. It is possible that sheriffs, and all other ministerial officers of the court of Exchequer, may be liable to attachment for refusing to obey the call of the commissioners; but it is not to be assumed, without the sanction of usage, that a court of equity, by introducing into a commission directed to private individuals, a description of the persons liable to be called upon by the sheriff, can thereby render all peace officers and all private subjects of the realm, who stand in no such relation to the court, liable to the proceeding by attachment, to which they would not be liable for disobedience to the sheriff. If a stranger be liable to an attachment, what is to be the consequence, and by what acts is his contempt to be purged? The contempt in question being a mere non-feasance of something required to be done at a time past, the party attached cannot purge his contempt by

compliance. A commissioner who is attached for permitting the defendant, after having taken him, to go at large, must either produce the body or pay the debt—Practical Register, *Sacheverell* v. *Sacheverell*, Hilary Term, 18 James, and *Nelson* v. *Yelverton*, Trinity Term, 18 James, Tuthill, 34, 32. Is it to be contended that a stranger, in consequence of whose default the defendant has been able to avoid arrest, may be subjected to the same penal consequences? The commission of rebellion is not the only commission which at the close of it contains a general command for all mayors, sheriffs, bailiffs, constables, and all other officers, ministers, and subjects whatsoever, to aid and assist the commissioners in the execution of the premises, as they shall answer to the contrary at their peril. These words are found at the close of a commission for dividing lands pursuant to a decree—2 Fowler's Practice of the Exchequer, 267; yet it will scarcely be contended that a private person, a stranger to the subject of the proceeding, would be liable to an attachment for withholding his personal assistance to the commissioners in executing the duties of their commission. In 2Harrison's Practice in Chancery, 399, we find, that, when the commissioners in such a case are resisted, a writ of assistance issues, directed to the sheriff, similar to that which issues in case of resistance to sequestrators. And it is well known that words of similar import are introduced in various commissions of inquiry, which certainly do not render all the subjects of the realm liable to the penal consequences of imprisonment without trial, for non-compliance with such general command.

That a private person would be justified in rendering assistance to a commissioner, when required by virtue of the command in the commission of rebellion, is not disputed; nor that he may possibly render himself obnoxious to a prosecution for a misdemeanor in refusing to lend his assistance; but, for the punishment of such refusal by

1838.

MILLER v. KNOX.

attachment, no single example has been found: and, in the absence of express authority or established usage, I feel myself bound to say, that, in my humble opinion, the power to issue an attachment in such case does not exist.

BOLLAND, B., signified his concurrence in the opinion of Mr. Justice Patteson and Mr. Justice Williams.

Fifth question.

PARKE, B.—In answer to the fifth question proposed by your lordships, the only one on which a difference of opinion exists, I have to state mine, that it is competent for the court, in the case suggested, to commit for a contempt.

The commissioners being, so to speak, sheriffs, for the purpose of executing this process in each and every county, and having, as it were, a special patent of assistance by the words of their commission, possess the like authority which is vested in the known officer of the law, by the common law, to take, if need be, the power of the county in which he is called upon to act, in order to execute the process; and it follows from thence that every one who would, under the same circumstances, be bound to obey the requisition of the sheriff of his county, is equally bound to obey that of the commissioners within the same county, and punishable if he do not. That this punishment may be effected by means of an indictment or criminal information, is clear upon the authorities. The only question is, whether it may be done by attachment.

3 Hen. 7, 1—
2 Inst. 193.

The power which courts have of vindicating their own authority, by punishing contempts committed in or out of court, is coeval with the common law, and stands upon immemorial usage; for which I would refer to *The King* v. *Almon*, Wilmot's Opinions, 254. It is a summary remedy for obstructions in the course of justice, and for causing the process of the law to be obeyed; and, upon principle, that remedy must be applicable (whether it ought to be

applied or not, is a different question, depending on circumstances,) to all cases in which the process has remained unexecuted by a breach of duty in others; whether such breach of duty be by mis-feasance or non-feasance—by doing that which ought not to be done, or omitting to do that which ought to be done. And, accordingly, it has been the constant practice to apply the remedy, not only to cases in which individuals have obstructed the process of the court, by impeding its officer in the execution of the writ, but where they have omitted to perform a duty, which is cast upon them by virtue of the process; as, for instance, where the sheriff has neglected to return a writ or bring in the body; or where a person subpœnaed as a witness has neglected to attend. Nor is this remedy confined to those cases in which a particular individual is specially named by the writ; for, it lies against a constable for not obeying a judge's warrant directed to all constables to arrest a man for felony—*Rex* v. *White*, Cas. temp. Hard. 42. Nor need a person be named at all: if a writ be directed to a bishop, his chancellor, whose duty it is to obey it (*Rex* v. *The Bishop of St. Asaph*, 1 Wils. 332), may be punished for disobedience.

In the court of Exchequer, constables and peace officers may be attached for refusing to obey the order given to all constables in the letters patent of assistance to officers of the customs, issued under the seal of the Exchequer, which are referred to in the 13 & 14 Car. 2, c. 11, s. 5. Whether such writ of assistance derive its authority from the common law, or from that statute, is wholly immaterial to this inquiry; it is enough that the constables are bound to obey it. Three instances have been referred to by my Brother Bosanquet, of rules made for such attachments on constables, in the court of Exchequer, in 1733, 1768, and 1817, which have been found upon a search by the officer of the court; in one of which the rule was made absolute;

1838.

MILLER v. KNOX.

in another submitted to. But it is said, that, in the case of the writ of assistance, and of the judge's warrant, the instruments are *directed* to all constables; and that the quasi writ of assistance contained in a commission of rebellion, is not so *directed*. This objection would be well founded, if the subject were not bound to obey such a writ: but, if he be, it seems to me to be a distinction without a real difference; and that he is so bound, has been already established, and is a matter conceded. What real difference can the form of the writ make, if in substance it command certain persons to do certain things, and that command is obligatory upon them? In truth the legal effect of the letters patent is just the same, whether in one form or another; and the true question is, whether the writ *command* the persons mentioned in it, and such persons are bound to obey it. Nor is there any substantial distinction, that, in the cases cited, the public were immediately concerned, and in this they are not, and that the attachment is sought for the advantage of a private suitor; for, the power to attach, in most cases, is executed for securing private rights, which the courts are established to protect, as well as those of the people at large. Nor does the absence of a precedent precisely in point make in my judgment the least difference, for, there is none in principle.

I am of opinion, therefore, that the court out of which the writ issues has a power to attach for contempt in the case of a stranger, who, being liable by law to be called upon to assist, and being duly called upon, declines to do so.

LITTLEDALE, J.—The judges who are in attendance are all agreed in the answers to the first four questions put by your lordships; and their opinion has already been delivered as to them by Lord Chief Justice Tindal. But, on the fifth, there is a difference of opinion. That ques-

tion is, "Suppose a stranger to the proceedings in the cause, but liable to be called upon to assist in the execution of a writ of rebellion, regularly called upon to render assistance, and declining so to do, can the court out of which such writ issued commit such person as guilty of a contempt of such court?"

There is no doubt whatever but it is a breach of a public duty in any of the queen's subjects to decline giving his aid and assistance, and for which breach of duty he is liable to an indictment or a criminal information; but the question is, is it a contempt of court for which he may be attached?

I will first consider how it would be, if the process were directed to the sheriff. In such case, there is no command or direction to the queen's subjects in general to aid and assist the sheriff in the execution of it. But, nevertheless, in a case of actual resistance or opposition, or ill-treatment of the sheriff or his officers, or any abusive or contumelious language as to the court or its process, or its officers, it is a contempt of the court, for which an attachment may be granted; and there are several instances mentioned in our law books, where attachments for such causes have been granted. All these, however, are cases of mis-feasance: and I cannot find any case where an attachment has been granted, or any authority to say that it may be granted, for the non-feasance of declining to aid and assist the sheriff.

The sheriff is authorised, in case of need, to call forth the posse comitatûs to aid and assist him in the execution of process; and, if any of the queen's subjects refuse to join it, there is no doubt but it is a breach of a public duty, which renders a man liable to an indictment or a criminal information: but, on this proceeding also of the posse comitatûs, I can find no instance of an attachment.

It is said in Brooke's Abridgment, "*Fine pur Contempt*," pl. 37, If the sheriff or his bailiff serves a writ,

1838.

MILLER v. KNOX.

every man is bound to aid them in their needs, and this by the common law; and, if they do not do it at the request of the sheriff, they shall be fined; as, if the sheriff requires them to take a felon, and they refuse, they shall be fined: so also in Brooke's Abridgment, *Trespass*, pl. 266, that "a sheriff or his bailiff may serve a replevin or other writ with three hundred men in harness: and every one is bound to aid the sheriff by the common law: and if they do not, they shall be fined, if they are required, and make default: and the same law is where the sheriff prays them to take felons." Even supposing this to be the law, it does not appear from these authorities how the fine was to be imposed; it could not be for a contempt of court, because, though the punishment is awarded for not aiding the sheriff on process, it is also awarded for not aiding the sheriff in endeavouring to arrest a felon: that arrest might be without any process of any court, because the sheriff of his own authority has a right to arrest felons without the process of any court; and therefore the mode of enforcing this fine must either be upon a conviction or on an indictment at the common law, or by some summary mode of inflicting fines, which might exist in those times of turbulence, but which is now forgotten: for, it never could be supposed that the court of Queen's Bench, as the superior court of criminal law jurisdiction, could have a power of calling upon a person who was a total stranger to their proceedings, to shew cause why an attachment should not be granted against him as a punishment for a supposed offence. Indeed, it is apparent that this fine could not be imposed for a contempt of court; for, a contempt of court is punishable by imprisonment as well as fine, if the court think proper; and therefore the fine which is here mentioned could not, as it should seem, apply to a proceeding by attachment.

I may further remark on the statute 2 Hen. 5, c. 8, which directs, in the second section, "that the king's liege people,

being sufficient *to travel*, in the county where such routs, assemblies, or riots be, shall be assistant to the justices, commissioners, sheriff, or under-sheriff of the same county, when they shall be reasonably warned to ride with the said justices, commissioners, sheriff, or under-sheriff, in aid to resist such routs, riots, and assemblies, upon pain of imprisonment, and to make fine and ransom to the king." Now, here is a parliamentary direction for all persons to be assistant to the justices, commissioners, sheriff, and under-sheriff, and to be punished by imprisonment and fine if they do not.

This is subject to the same remark that I have already made as to aiding sheriffs in the execution of process; they are commanded to do what is required by this act of parliament; if they do not, they are subject to an indictment or criminal information; but the fine which is mentioned cannot be for a contempt of court; for, the cases mentioned in the act, of riots, routs, and assemblies, are wholly unconnected with any court, and yet the parties may be imprisoned and fined; and therefore, when it is said in the quotation from Brooke's Abridgment that persons may be fined who refuse to assist the sheriff, it cannot be by attachment for a contempt of court. The view which I take as to this, appears to me to be strengthened by the provisions of the statute of Westminster 2, 13 Edw. 1, c. 39, which, among other things, says, "and as soon as his bailiffs do testify that they found such resistance, forthwith, all things set apart (taking with him the power of the shire), he shall go in proper person to do execution; and, if he find his under-bailiffs false, he shall punish *them* by imprisonment, so that others, by their example, may be reformed. And if he do find them true, he shall punish the resisters by imprisonment, from whence they shall not be delivered without the king's special commandment. And if per case the sheriff when he cometh do find resistance, he shall certifie to the court the names of the re-

1838.

MILLER v. KNOX.

sisters, aiders, consenters, commanders, and favourers, and by a writ judicial they shall be attached by their bodies to appear at the king's court; and if they be convict of such resistance they shall be punished at the king's pleasure. Neither shall any officer of the king meddle in assigning the punishment, for our lord the king hath reserved it specially to himself, because that resisters have been reputed disturbers of his peace, and of his realm." It may be a question whether this statute of Westminster be in all its parts in affirmance of the common law; in some parts it certainly is so, and is so treated by Lord Coke in his 2nd Institute, p. 449.

Lord Coke, in commenting upon the statute of Westminster 1, 3 Edw. 1, c. 17, as to where distresses were impounded in a castle or fortress (2 Inst. 198), comments more largely upon what was the common law; and it is in his commentary upon that statute that he cites Bracton, who wrote before the statute, to shew what the common law was; but Bracton's authority is only as to persons who resist the process of the sheriff. I think, however, it is quite immaterial whether the statute of Westminster the 2nd, 13 Edw. 1, c. 39, be altogether a new law, or only in affirmance of the common law: if it be a new law, it does not extend the proceeding by attachment to those who refuse to assist the sheriff, but only to resisters, aiders, consenters, commanders, or favourers.

And again, suppose this act of parliament be wholly in affirmance of the common law, then the act must have been passed with a view of making the law more publicly known, and emphatically to warn the king's subjects of the consequences of disobedience to the law; and it must therefore be presumed that the act made public and declared the whole body of the law as to this subject; and it was more particularly necessary to declare what the law was as applicable to those who refused to assist the sheriff, because upon that the law might be more doubtful; but

1838.

MILLER v. KNOX.

nobody could ever doubt what the law was in cases of actual resistance. I think, therefore, that the silence of the act of parliament as to persons who refuse to assist the sheriff, and the making the provisions as to those who resisted the sheriff, shews that it was not considered that the refusal to assist the sheriff was ground for an attachment.

It is to be observed that I do not mean to contend that the original of a commitment for contempt was derived from this statute; it has been supposed that a passage in Gilbert's History of the Common Pleas, pages 20 and 21, so considers it; but that is not so, if you take the whole passage together; and this is explained by Lord Chief Justice Wilmot in *The King* v. *Almon*, in his Opinions and Judgments, page 255: and on the contrary, I say the origin of commitment for contempt is not derived from that statute; and I entirely agree, that, if a contempt of court be committed, the power to commit for a contempt is coeval with the foundation and jurisdiction of our courts of justice, and necessary to give effect and secure respect to their proceedings.

But the question is, what is a contempt: and I think that the mere non-feasance in refusing to assist a sheriff in the execution of process, is not a contempt. No case has occurred, and there is no authority in our text books to say that it is; and the silence for many centuries must be taken as a strong proof that is not so.

I have hitherto considered the case as standing upon the power of the sheriff as under the writ itself directed to him. But, besides that, he has always a patent of assistance from the crown, by which the king commands that all archbishops, bishops, dukes, earls, barons, knights, freemen, and all others of the county, be to the sheriff thereof in omnibus quæ ad officium illud pertinent extendentes, auxiliantes, et respondentes—see 2 Inst. 194; and the form as given in Dalton, p. 8.

1838.

MILLER v. KNOX.

These patents of assistance are probably as old as the office of sheriff, and are meant to add to the general power of the sheriff at the common law; and I do not mean to say but that, as they emanate from the crown to enforce the authority of the sheriff acting under the orders of the court, they may not have the same effect as if the clause of assistance had been introduced into every writ. But, supposing that to be so, there is no authority or practice that, even with the patent of assistance, a person who refuses to assist the sheriff is guilty of a contempt.

But it may be said, that, whatever may be the case of a sheriff, yet that, under a commission of rebellion, all the king's subjects are required by the commission of rebellion to aid and assist the commissioners: but I think that the commissioners stand in the same predicament as the sheriff with his patent of assistance.

If this question had arisen on the refusal of the appellants to assist the sheriff in the execution of the writ of attachment, or the attachment with proclamations, prior to the commission of rebellion, the direction to all the queen's subjects to aid and assist the sheriff would not have been inserted in the attachment, because he had his patent of assistance. And so also, in executing the attachment with proclamations; but then, on a non est inventus returned on these, the commission of rebellion is directed to persons named by the court, and these commissioners have authority all over the kingdom; and it is the same thing as if an attachment issued to every separate sheriff in the kingdom.

The word rebel is used, but it is not used in a treasonable sense; it is only that he is in contempt, and cannot be found in the bailiwick of the sheriff. Now, these commissioners, who of course vary from each other in every case, have no patent of assistance to call upon all the queen's subjects; and therefore, to give them the same power as the sheriffs have, this direction to the queen's

1838.

MILLER v. KNOX.

subjects to aid and assist, is inserted in the body of the writ; and by that means they possess the same power that the sheriff would have had upon the attachment; but they are never meant to have greater powers, for, they have precisely the same things to do as the sheriff; and, if it be not a contempt to refuse to assist the sheriff with his patent of assistance, it can be none to refuse to assist the commissioners who have the clause of assistance inserted in the commission. The object of both is to take care that the king's writ be obeyed; but one officer has the writ and command of assistance separately, and the other officer has them both together.

The ground I go upon is, that a non-feasance of this kind is not a contempt of the court; and I know of no instance or authority, except as after mentioned, where an attachment has been granted on a proceeding directed to persons in general, without mentioning their names. There are a great variety of cases where attachments are granted for non-feasance; but, for the most part, they are where the parties are described by name or by office. Such are, attachments against sheriffs for not returning writs, for not paying over money in their hands, or, in general, for not doing any thing which the court requires them to do in the course of their duty. It lies against the attornies and other officers of the court for a great variety of acts of non-feasance: so also against the suitors of the court for not paying costs, or not performing an award made under the authority of the court: so against a witness for not attending a trial pursuant to a subpœnâ: so also, against a person for not making a return to a writ of habeas corpus to bring up one illegally detained. The case of *The King* v. *White*, Cas. temp. Hardw. 42, was where the court of King's Bench issued an attachment against a constable for not executing a warrant which had been issued; but that was in respect of criminal process, and where the court of King's Bench claimed the power to grant warrants in cri-

1838.

MILLER v. KNOX.

minal proceedings. There may, indeed, be an attachment against persons for not returning a writ of mandamus directed to many persons who are not a corporation, and who may not be designated by name; but then it is directed to a class of persons; and besides, such an attachment could only be on the party refusing to come into court and do the thing required, and not for a bye-gone thing.

It may be said, that, though the commission of rebellion does not mention any body by name in the clause of aid and assistance, yet that, when the commission of rebellion is properly notified to any individual, it is to be considered in the same light as if his name had been inserted in it: but I know of no instance where that has been so held; and I think that sort of virtual and inferential direction to the party is not to be considered in the same light as if he had been named in the commission; and that it does not make him guilty of a contempt of the court, and render him liable to a commitment on a summary proceeding.

I must now notice a proceeding under which I understand attachments have been granted in cases something resembling the present: and that is, under writs of assistance granted to persons employed in the collection of the revenue of the crown. Writs of assistance are for some purposes of very antient date; but, as to those for collecting the revenue, I cannot find any trace of them before the 13 & 14 Car. 2, c. 40, s. 5, which authorises them to be granted under the seal of the court of Exchequer, to take a constable, headborough, or other public officer, to do various acts specified: and the same powers have been continued in various subsequent acts of parliament, the last of which appears to be the 3 & 4 Will. 4, c. 53, ss. 38, 39.

There are instances of informations filed in the crown office by the Attorney-General, against persons for refusing to aid and assist under a writ of assistance; and there are also, I understand, some instances of attachments being granted by the court of Exchequer against persons

1838.

MILLER v. KNOX.

for refusing to aid and assist the revenue officers. I have not been able to learn whether these instances have been numerous: nor whether the question was discussed in the court of Exchequer; nor whether they were granted on the ground of its being a contempt of the crown in matter relating to the collection of the revenue; which it might be said was as much allowable as in cases where parties refused to pay obedience to the warrants of the judges of the King's Bench in criminal proceedings.

Upon the whole consideration of the fifth question, I come to the conclusion that it is not a contempt of the court upon which the party can be committed.

PARK, J., gave no detailed opinion, but simply expressed his entire concurrence in the opinion about to be given by Tindal, C. J., as to the fifth question, as well as in that already given by that learned judge upon the first four questions.

TINDAL, C. J., now proceeded to give his opinion on the fifth question proposed by the House:—

Fifth question.

In answer to the last question above proposed to her majesty's judges, and upon which I regret to find that two of my brethren differ from me, the opinion at which I have arrived, upon the best consideration I can bring to the subject, is this—that, if a stranger to the proceedings in the cause, being in other respects liable to be called upon to assist in the execution of a writ of rebellion, has been regularly called upon to render such assistance, and refused or declined so to do, the court out of which such writ issued may proceed against him by attachment for a contempt of the court; and, if no sufficient answer or excuse be shewn on his part, he may be committed for such contempt; and I ground this opinion upon the consideration that the proceeding by attachment is a legal and constitutional mode of punishing persons guilty of contempts against the au-

1838.

MILLER v. KNOX,

thority of the superior courts of law; and that the disobedience of the mandatory part of this writ by a person who has been duly made acquainted with its exigency, and required to assist, and has not at the time a legal excuse for refusing or declining to assist, is a denial of the authority, and therefore a contempt of court.

That there must exist some mode of enforcing the mandatory part of this writ requiring from strangers aid and assistance in the execution thereof, is obvious, unless such mandate, which has been inserted in the writ from the earliest times, and has been continued without interruption down to the present, is to be regarded as a mere formula of useless words, or an idle and empty threat; and, therefore, the great question that has been argued at your lordships' bar has been, not whether the court has the power to issue the mandate, but as to the mode of enforcing it by law; the plaintiff in error contending that the course to be pursued against such as refuse and neglect to obey its authority, is, by indictment, and indictment only; the defendant in error insisting, on the other hand, that, to proceed against such as refuse obedience to its command by attachment for contempt of the court out of which the process issues, is a course sanctioned by law.

That the superior courts have the power of issuing attachments for the purpose of vindicating their own authority, and punishing contempts committed against them, is not denied. It was admitted, in the course of the argument, that attachments may properly issue against those who actually resist the process of the court, who treat it with contumely, or who commit any act of violence or insult against the ministers of the court employed in executing such process; such acts are universally allowed to be properly punishable as contempts of the court, as they amount in effect to an obstruction of the course of justice, and require, upon that account, a more speedy punishment than can be obtained by recourse to indict-

ment. Indeed, it is difficult, and, so far as I have been able to discover, impracticable, to find the period of time when proceedings by attachment were first introduced; such course of proceeding must of necessity have been coeval with the institution of courts themselves; since, without that speedy remedy, they could never either have acquired or sustained that dignity and authority in the eyes of the people which is essential for the performance of the duties with which they are entrusted.

As to the origin of attachments for contempt.

It was stated, indeed, in the course of the argument, that attachments for contempts owe their origin to the statute of Westminster 2, c. 39; and for this the authority of Chief Baron Gilbert has been cited in his History of the Common Pleas, p. 25. Yet, upon an accurate consideration of that passage in Gilbert, and of the statute itself, it appears that neither will support such a proposition. In the passage referred to, the Chief Baron lays it down that "the original of commitment for contempt seems to be derived from this statute, for, since the sheriff was to imprison those that resisted the process, the judges that awarded such process must have the same authority to vindicate it; hence, if any one offers any contempt to the process, either by word or deed, he is subject to commitment during pleasure, viz. à quâ non deliberetur sine speciali præcepto Domini Regis; so that, notwithstanding the statute of Magna Charta, that none are to be imprisoned nisi per legale judicium parium suorum, vel per legem terræ, this is one part of the law of the land to commit for contempts, and is *confirmed* by this statute." Now, the very language of Chief Baron Gilbert in the latter part of the clause is at variance with the first, viz. that it is *confirmed* by the statute, not *created* by it; and the language of the statute of Westminster itself imports that the writ of attachment was not then for the first time introduced; the statute enacting, "that, if the sheriff, when he cometh, do find resistance, he shall certify to the court

1838.

MILLER v. KNOX.

the names of the resisters, aiders, consenters, commanders, and favourers; *and by a writ judicial, they shall be attached by their bodies* to appear at the king's court; and, if they be convict of such resistance, they shall be punished at the king's pleasure:" words which are consistent rather with the attachment being a mode of proceeding previously known and practised in the courts, and directed by the statute to be applied to this particular case, than with the institution of a proceeding altogether unheard of in the courts before that time. And the authority of the Year Book, 3 Hen. 7, 1 (which has been before referred to), is express to the point, that the statute Westminster 2, c. 39, was not introductory of a new law against resisters of the sheriff, but only confirmatory of the common law.

That an attachment is a proceeding which has existed time out of mind against persons guilty of a contempt of court, cannot therefore be doubted; and the question that has been made at your lordships' bar has been, whether the court has any authority to issue it against persons guilty, not of any positive act of contempt, but of mere non-feasance only: and, upon consideration of the cases in which it has been held to apply, it appears to me, if not by direct authority to be drawn from them, at least by necessary analogy, that it must apply to the case of mere non-feasance; that is, in the particular case, to mere refusal to give aid to the officer.

As to the mode of proceeding for a refusal to aid in the execution of an ordinary writ.

I. In the case of refusal to aid and assist the sheriff in the execution of an ordinary writ, it may be admitted that the more common course of proceeding would be by indictment or information against the party so refusing; there being in the crown office informations to be found upon the file against such offenders. But, admitting that such would be the ordinary course of proceeding in that case, it would not govern the present; for, there is a broad distinction between the two cases. The writ of execution to the

sheriff, in an ordinary suit, is directed to the sheriff; it commands the sheriff alone; it does not call on any of the liege subjects of the king to aid or assist; and consequently the declining to give aid or assistance in the execution of such a writ, would be no direct contempt of the court, however it might amount to a breach of the subject's duty to the king, and expose the party to an indictment or information; whilst, on the contrary, the commission of rebellion contains a clause calling on other ministerial officers, besides the sheriff, and on all other liege subjects, to be aiding and assisting; and consequently the refusal to comply with it is a direct denial of the authority of the court from which the commission issued.

And, accordingly, it appears, that, when a writ of assistance has issued to the sheriff, there are instances of attachments upon the files of the court of Exchequer against persons who have refused their aid, which have been more particularly referred to by my Brother Parke, who has preceded me.

As to whether a mere non-feasance amounts to a contempt for which an attachment may issue.

II. But the question has been argued, Is this mere non-feasance a contempt at all? The answer appears to be, first, that it falls distinctly within the definition of a contempt adopted by Viner, from the Practical Register of the Court of Chancery. It is "the not doing what the party is commanded or required by the process or order of the court"—Viner's Abridgment, *Contempt*, (A). Still further, it appears, that a mere non-feasance is a contempt, in the case of a writ of subpœna ad testificandum; where, if the party to whom it is addressed neglects or refuses to obey it, the ordinary and well-known course is, to proceed by attachment for a contempt. But it is objected, that, in the case of the subpœna, the process is directed to the party by name. Undoubtedly it is so; I cannot, however, perceive any difference, in reason and principle, between a process directed to the individual by name, and a process directed to a class of persons by a

1838.

MILLER v. KNOX.

general description, and personally served upon a particular individual comprised within such class. The authority of the court which issues the general command, is admitted; that the description includes the individual upon whom it is served, is admitted also; that it is a command sanctioned by the usage of the court from the earliest time, and confirmed by law, is also admitted. Upon what principle, then, can the refusal to obey it be less a contempt of the court, and less punishable by attachment, than in the case of a subpœna addressed to the particular party?

Disobedience of the Chief Justice's warrant, a contempt.

III. And accordingly, in the case of *The King* v. *White and Others*, Cas. temp. Hard. 42, where an attachment was moved for against the defendants, constables of Scarborough, for not obeying the Chief Justice's warrant, directed "*to all constables throughout England*," to arrest a man for felony, it was said by the court, "that the judges of this court have power to grant warrants to be executed by all constables &c. throughout England: and disobedience to a judge's warrant is a contempt of the court, and such a contempt as the court will take notice of by way of attachment." In that case the direction of the warrant is general; it is the service on the individual constable, and the disobedience by such individual, which form the ground of the attachment. And, although it was said, in *The Queen* v. *Wyatt*, 1 Salk. 380, that the constable to whom a warrant was directed by a justice of the peace is *indictable*, and that, when an officer neglects a duty incumbent on him either by common law or statute, he is for his default *indictable;* it by no means follows that the superior courts of law might not also grant an attachment for a similar neglect to process issued by them. Indeed, the case above referred to is a direct authority that they may; and, although it would not form any ground for inferring the authority of the courts to issue an attachment in this case, if it could not be supported by other considera-

tions: yet it is not immaterial to observe that the mode of investigating the complaint, by an application to the court for an attachment, is in most instances more favorable to the party accused than that by indictment.

If the charge of disobedience to the mandate is denied, the party's own denial upon oath is more ready to him than the calling a witness upon an indictment to prove his obedience; for *he* must know, if any one does, whether he has obeyed it or not; and, again, when he has declined or refused to obey it, the ground for his disobedience in most cases must be exclusively confined to his own breast. Was the requisition of the commissioners clearly made known to him? was their authority sufficiently explained at the time the request was made? was their request of assistance justified by the exigency of the occasion? was it a request reasonable as to the individual, regard being had to his age, strength, and condition of mind or body? was the demand upon his services reasonable in respect to their extent or duration? was he prevented by the performance of conflicting duties of an equal or greater pressure? or was he disabled by any private concerns of a nature and description so pressing and overwhelming as at once to rebut the charge or even the suspicion of any contempt of the court? All these, and many other grounds of denial or excuse, which may vary infinitely in different cases, are extremely difficult to prove by witnesses on an indictment, but may at once be made apparent to the court by the affidavit of the party charged. And, let it not be forgotten, that the party charged has the power of stating the facts in his favour according to his own impression of the truth, which is never likely to be unfavourable to himself; and that the clear and explicit statement of the party so charged is taken by the court to be true, and cannot be made the subject of contradiction in this stage of the proceedings: whereas, in the case of an indictment, he cannot be a witness for himself at all: so that the balance of advantage

1838.

MILLER v. KNOX.

in this mode of prosecuting for the offence is very far in favour of the party accused.

Upon the whole, therefore, from the reason of the thing itself, by analogy to cases which have occurred, and by the authority of those which have any bearing upon the point, I would humbly state my opinion to your lordships to be, that an attachment for contempt under the circumstances assumed in your lordships' question, is a proceeding justified by law.

Judgment affirmed.

Tuesday, May 22nd.

WRIGHT *v.* DOE *d.* TATHAM.

Upon an issue as to whether or not one J. M. was and had been from his attaining to competent age in the year 1779, down to and at the time of his making a will and codicil in the years 1822 and 1825 respectively, a person of sane mind and memory, and capable of making a will; the defendant, in support of the affirmative, offered in evidence—a letter, dated Oct. 12, 1784, from the testator's cousin, with whom he appeared to have been in correspondence about that period—a letter from the vicar of Lancaster, requesting the testator to direct his attorney to do a certain act, which letter was found indorsed in the usual way of a business letter by the attorney—and a letter from the curate of the chapelry of Hornby, in Lancashire, of which the testator was the patron, containing general expressions of gratitude for favours conferred upon the writer. The writers of these letters were well known to the testator, and had been dead many years. The letters were offered for the purpose of shewing the opinions of the writers, and their treatment, of the testator:—Held, that they were not admissible in evidence.

THIS was an action of ejectment brought by the lessor of the plaintiff below (Admiral Tatham) the heir-at-law of the late John Marsden, Esq., of Hornby Castle, in the county of Lancaster, against the defendant below, who had been steward to and claimed as devisee in trust under the will of that gentleman, to recover possession of considerable estates in Lancashire (*a*).

At the first trial of the ejectment, before Gurney, B., at the Lancaster Spring Assizes, 1833, in support of the affirmative of the issue—whether or not John Marsden had been, from his attaining to competent age, and down

(*a*) The cause first came on in the shape of an issue of devisavit vel non, directed by the Lord Chancellor, at the Spring Assizes at Lancaster in 1830. On that occasion certain of the letters were tendered in evidence, and rejected by Park, J., and a verdict was found for the defendant below, establishing the will. A new trial having been applied for, and refused, the heir-at-law brought an ejectment.

1838.

WRIGHT v. DOE d. TATHAM.

to the time of executing the will, a person of sane mind and memory, and capable of making a will—amongst other evidence, the defendant below offered certain letters, hereinafter set forth, which the learned baron ruled to be inadmissible. To that ruling (amongst others) the counsel for the defendant below tendered a bill of exceptions. A verdict having been found for the lessor of the plaintiff below, judgment was entered up thereon, and a writ of error sued out, returnable in the Exchequer Chamber. The case was argued in Hilary term, 1834, before Tindal, C. J., Park, J., Gaselee, J., Bosanquet, J., Bayley, B., Vaughan, B., and Gurney, B. A difference of opinion existed in the court as to whether or not the letters were admissible in evidence, but no decision was come to on the point, a venire de novo being awarded upon another ground of objection—see *Wright* v. *Doe* d. *Tatham*, 1 Ad. & E. 3, 3 N. & M. 268.

First trial.

The second trial was had before the same learned Baron, at the Lancaster Summer Assizes, 1834. The letters were again tendered in evidence on the part of the defendant below, and their admissibility again objected to; whereupon the learned Baron said—"The judges have not decided the point; but there is such a difference of opinion amongst the judges upon the subject that it is my intention to receive them, subject to further consideration." The letters were accordingly received. Upon a motion for a new trial on the ground that these letters had been improperly received in evidence, the court of King's Bench (consisting of Lord Denman, C. J., Littledale, J., Williams J., and Coleridge, J.,) unanimously held that the letters in question were not admissible, and accordingly the rule for a new trial was made absolute in Hilary Term, 1836. With respect to what passed in the Exchequer Chamber on the former occasion, Lord Denman observed: "There is reason for believing that of seven judges who sat in that court of error, four thought these letters receivable, and

Second trial.

1838.

WRIGHT v. DOE d. TATHAM.

three were of the contrary opinion"—see *Doe* d. *Tatham* v. *Wright*, 6. N & M. 132.

Third trial.

On the third trial, before Parke, B., at the Lancaster Summer Assizes, 1836, the three letters now in question were offered in evidence, and rejected by the learned Baron. A bill of exceptions was tendered, and judgment being signed for the lessor of the plaintiff below, the case was again brought by writ of error to the Exchequer Chamber, and twice argued, before Tindal, C. J., Park, J., Parke, B., Bosanquet, J., and Gurney, B.; Coltman, J., assisting at the second argument, Gaselee, J., at the first. The court being equally divided in opinion—Tindal, C. J., Park, J., and Gurney, B., holding that the three letters *were*, and Bosanquet, J., Parke, B., and Coltman, J., that they *were not*, admissible in evidence: the judgment of the court below was thereupon affirmed—see *Wright* v. *Doe* d. *Tatham*, 2 Nev. & P. 305—and the record was brought by writ of error to the House of Lords.

Bill of exceptions.

The bill of exceptions in substance stated—"That upon the said trial it became and was a matter in controversy and at issue between the said parties, whether or not the said John Marsden was and had been from his attaining to competent age in the year 1779, and down to and at the time of his making the will and codicil in the years 1822 and 1825 respectively, a person of sane mind and memory, and capable of making a will; and, as evidence to maintain the affirmative of the said matter in controversy and at issue, the counsel for the defendant (below) proved, that, after the death of the said John Marsden, many letters addressed to him by various persons were found with other papers in a cupboard under his book-case in his private room; that, to many of these, letters had been written and sent in answer, which last-mentioned letters were proved to be in the hand-writing of and signed by the said John Marsden; that, upon some others of the letters so found, there were indorsements in the hand

1838.

WRIGHT v. DOE d. TATHAM.

writing of the said John Marsden; and that the letters so answered and indorsed were tendered and received in evidence upon the said matter in controversy and at issue; that, amongst the letters so found, there was found a letter addressed to the said John Marsden by one Charles Tatham, a cousin of the said John Marsden, who was at the time of the date and writing of the said letter, and for some years after, staying in America. This letter purported to be dated Alexandria, 12th October, 1784; it was open, with the seal broken; and the following is a copy of it:—

Oct. 12, 1784—letter from C. Tatham to the testator.

"'My dear cousin,—You should have been the first person in the world I would have wrote too had'nt my time been employ'd by affairs that call'd for my more imeadeate attention; in the first place I am called upon by my buseness, it being the first consideration must by no means be neglected. As for my Brother, his goodness is such that I know he will excuse me till I am more disengaged: was I to write to him in my present embarased situation I perhaps might only do justice to my own feelings, and he might construe it deceit, so different an oppinion have I of him to mankind in gen'. who above all things are fond of flattery. I shall now proceed to give you a small idea of what has pass'd since my departure from Whitehaven, as I suppose Harry long ere now has told you the rest. We sail'd the 14th July, and had good weather the chief of the way, but as you know nothing of sea fareing matters it is not worth while to dwell upon the subject. We reached the Cape of Virginia the 13th Sept^{r}, but did not get heare till the begining of the present month, so we were about twenty day in coming 350 miles. When I arriv'd I was no little consirned to find the Town in a most shocking condition, the people dieing from 5 to 10 p^{r} day, and scarsely a single house in Town cleare of descease, which proves to be the putrid fevour. I am going to Philadilphia in a few days, if God spares

1838.

WRIGHT v. DOE d. TATHAM.

my life and permits me my health, and their I intend to stay till affairs here bare a more frendly aspect; and so the next time you here from me will be I expect from that place, tho' you'l please to direct to me heare as usual. God bless you, my dear cousin; and may you still be bless[d] with health, which is one of greatest blessings we require hear, is the sinseare wish of,

'Dr. Cousn, your affect. kinsman,
'and very humble servt,
'Chas. Tatham.'

"'P. S. Pray give my kind love to my aunt, my brother, and my cousin Betty; allso my complements to all the rest of the Family, and all others my former acquaintances &c. Alexandria, 12th Oct. 1784.'

"And the counsel for the said defendant (below) further proved that the said letter was marked with the London post-mark as a ship-letter, and was in the hand-writing of the said Charles Tatham, and addressed to the said John Marsden, Esq., Wennington Hall, where the said John Marsden then resided; and it was also proved that the said Charles Tatham was personally acquainted with the said John Marsden, and had been dead many years.

"And amongst the said papers of the said John Marsden, there was found the following draft or copy of a letter from the said John Marsden to the said Charles Tatham, in the hand-writing of the said John Marsden:—

June 1, 1787—draft or copy of letter from the testator to C. Tatham.

"'Dear cousin,—I received your letter some time ago, wherein you mentioned that you had sent me a map of the United States of America, to the care of Mr. George Welsh, merchant, in Liverpool. I deferred writing till such times as I had made inquiry after it, but did not get the map till the 7th instant. You mentioned in your letter that you had sent me a small quantity of dried fruit. I received nothing but the map, for which I am obliged to you. My aunt has had very poor health since you left England, she has scarce ever been well; I am in hopes

1838.

WRIGHT v. DOE d. TATHAM.

she is getting better again; I think that change of air and a journey would be of service to her. We have lately had an account of poor Mrs. Smith's death; she died at St. Alban's the 7th instant. My aunt has had a letter from your brother Harry; he is very well. It is reported that your acquaintance, Mr. John Bradshaw, is going to be married to a Miss Fell, of Lancaster; whether there is any truth in it or not, I cannot tell. I suppose you have received my last letter, wherein you will see an account of your nurse's death. I have nothing further to add, but compliments from my aunt and your cousin Betty.

'I am, Dear cousin, your affectionate kinsman,

'Wennington Hall, June 1, 1787. 'J. Marsden.'

'C. Tatham, Esq.'

which draft or copy of such letter from the said John Marsden to the said Charles Tatham was produced and read in evidence on the part of the said defendant (below).

"And thereupon the counsel for the said defendant (below) proposed and tendered the said letter of the said Charles Tatham to be admitted and read to the jury as evidence for the defendant (below) upon the said matter so in controversy and at issue as aforesaid; but the counsel for the lessor of the plaintiff (below) objected to the admissibility of such letter as evidence, and to its being read to the jury: and the said justice stated his opinion to be, and held, that the said letter was not by law admissible as evidence, and refused to admit the same to be read to the jury: whereupon the counsel for the said defendant (below) made his exception to the said opinion and ruling of the said justice, and tendered this his bill of exceptions thereon.

"And also as evidence to maintain the affirmative of the said matter so in controversy and at issue as aforesaid, the counsel for the said defendant (below) proved, that, after the death of the said John Marsden, and at the same

1838.

WRIGHT v. DOE d. TATHAM.

time and place where the said letter from the said Charles Tatham was found, there was found amongst the said letters before mentioned a letter addressed to the said John Marsden, at Wennington aforesaid, where he then resided, by one Oliver Marton: this letter purported to be dated May 20, 1786; it was open, with the seal broken, and the following is a copy of it:—

May 20, 1786—letter from the Rev. O. Marton to the testator.

" 'Dear Sir,—I beg that you will order your attorney to wait on Mr. Atkinson or Mr. Watkinson, and propose some terms of agreement between you and the parish or township, or disagreeable things must unavoidably happen. I recommend that a case should be settled by your and their advice, and laid before counsel, to whose opinions both sides should submit; otherwise it will be attended with much trouble and expense to both parties.

'I am, Sir, with compliments to Mrs. Cookson,

'Your humble servant,

'Oliver Marton.'

'I beg the favor of an answer to this.'

" And the counsel for the said defendant (below) further proved that the said Oliver Marton was at the date of the above letter vicar of Lancaster, a town about eleven miles distant from the then residence of the said John Marsden; that he was acquainted with the said John Marsden; that he had been dead upwards of thirty years: and that the letter was in his hand-writing.

" And the counsel for the said defendant (below) further proved, that one James Barrow was at the time of the date of the said letter the attorney of the said John Marsden, and had been dead upwards of thirty-five years, and that an indorsement on the back of the said letter, in these words, '20th May, 1786, letter from Mr. Marton to Mr. Marsden, was in the hand-writing of the said James Barrow: and thereupon the said counsel for the said defendant (below) proposed and tendered the said letter to be admitted and read to the jury as evidence for the said

1838.

WRIGHT v. DOE d. TATHAM.

defendant (below) upon the matter so in controversy and at issue as aforesaid; but the counsel for the lessor of the plaintiff (below) objected to the admissibility of such letter as evidence, and to its being read to the jury; and the said justice stated his opinion to be, and held, that the said letter was not by law admissible in evidence, and refused to admit the same to be read to the jury: whereupon the counsel for the said defendant (below) made his exception to the said opinion and ruling of the said justice, and tendered this his bill of exceptions thereon.

"And also to maintain the affirmative of the said matter so in controversy and at issue as aforesaid, the counsel for the said defendant proved, that, after the death of the said John Marsden, and at the same time and place when the said letters from the said Charles Tatham and Oliver Marton were found, there was found amongst the said letters before mentioned a letter addressed to the said John Marsden by one Henry Ellershaw, which was open, the seal of which was broken, and of which the following is a copy:—

Oct. 3, 1799—letter from the Rev. Henry Ellershaw, to the testator.

"'Dear Sir,—I should ill discharge the obligation I feel myself under, if, in relinquishing Hornby, I did not offer you my most grateful acknowledgments for the abundant favours of your hospitality and beneficence. Gratitude is all that I am able to give you, and I am happily confident that it is all that you expect. I have only, therefore, to assure you, that no circumstances in this world will ever obliterate from my heart and soul the remembrance of your benevolent politeness. May the God Almighty long bless you with health and happiness! and, when his Providence shall terminate your christian warfare upon earth, may the angels of the Lord welcome you into blessedness everlasting! It will afford me pleasure to continue my services during the vacancy, if agreeable to you. With every sentiment of respect and affection to yourself and the worthy family at the castle, I hope you will ever

1838.

WRIGHT v. DOE d. TATHAM.

find me your grateful, faithful, and obliged servant,

'Henry Ellershaw.

'Please deliver the inclosed to Mr. Wright.

'Chapel-le-dale, 3rd October, 1799.'

"Addressed—'John Marsden, Esq., Hornby Castle.'

"And the counsel for the said defendant further proved, that the said Henry Ellershaw had been for several years the curate of the chapelry of Hornby, to which he had been appointed by the said John Marsden, as patron of the said chapelry; that he was well acquainted with the said John Marsden; that he had been dead some years; that the letter was in his hand-writing; and that it had been written by him in the presence of the Rev. John Garnett, his assistant, when he the said Henry Ellershaw was about relinquishing the said preferment. And thereupon the counsel for the defendant proposed and tendered the said letter to be admitted and read to the jury as evidence for the defendant upon the matter so in controversy and at issue as aforesaid; but the counsel for the plaintiff objected to the admissibility of such letter as evidence, and to its being read to the jury: and the said justice stated his opinion to be, and held, that the said letter was not by law admissible as evidence, and refused to admit the same to be read: whereupon the cousel for the defendant made his exception to the said opinion and ruling of the said justice, and tendered this his bill of exceptions thereon."

On the 12th and 13th February, 1838, the case was argued in the House of Lords by *Cresswell* and *Starkie* for the plaintiff below, and *Sir F. Pollock* and *Sir W. Follett* for the defendant below. The judges now delivered their opinions as follows:—

None of the letters admissible.

COLERIDGE, J.—In answer to the question stated by your lordships, I beg humbly to express my opinion that

1838.

WRIGHT v. DOE d. TATHAM.

neither of the letters was properly admissible in evidence on behalf of the defendant below. Only three grounds, that I am aware of, have been stated in argument for their admissibility, and I can conceive no more: it has been urged, that, considering the nature of the question at issue, the time when the letters were written, and the decease of the writers, they are admissible as declarations of the unbiassed opinions of those writers; opinions on which they acted, and as accompanying such acts:—Secondly, it has been said that they are admissible as acts of treatment, exhibited by the writers towards Mr. Marsden:—Thirdly, that they are admissible because they accompany and explain acts done by Mr. Marsden.

The first two grounds apply generally, and, if correct in principle, would sustain the admission of all the three letters; but I think they are not to be supported: the latter is undoubtedly sound as a rule, and therefore each letter must be tried by it, and, in order to exclude all, all must be shewn not to fall within it.

In the examination of these three grounds, I despair of novelty either in argument or illustration: they have been already in my opinion so admirably sifted in judgments which are before the House, that I can scarcely hope to do more than select and arrange for my own purpose, what has been better said by others before me.

1. As to the admissibility of the letters as declarations of the unbiassed opinions of the writers.

The first ground on which the admissibility of the letters is rested, lays all participation, all acts by Mr. Marsden in regard to them, out of the question: it becomes indifferent whether the letters ever reached him or not; the only things material are the writing and sending. The former shews the opinion of the writer, the latter vouches it. But, if the writer were alive and producible in court, although the same reasoning would apply, it could hardly be contended that the letters could be read: the first principles of the law of evidence would prevent it: and I do not think it can be said that the death of the writer

1838.

WRIGHT v. DOE d. TATHAM.

necessarily varies the rule. It is every day's experience that the death of a witness deprives the party of the testimony he would have given, although his statement of it, and his having acted upon the faith of it, may be capable of the clearest proof. Nor does the rule vary because the remoteness of the period, and the absence of any dispute on the matter at the time, put aside all suspicion of insincerity. The general rule still remaining the same, that evidence must be given upon oath, and it being certain that this case does not fall within any of the known exceptions hitherto stated in our books, is there any new principle on which it may be rested? As all the participation by Mr. Marsden is by the supposition excluded, the letters stand on exactly the same footing as if they had been addressed or their contents really stated to a third person; and the argument for the defendant below has met this view of the case, as it was bound to do. One learned counsel at your lordships' bar contends that the opinion expressed in or to be collected from the letter is evidence, because it is a declaration accompanying the acts of writing and sending the letter. But the answer to this is irresistible: wherever a declaration, in itself inadmissible, is admitted as part of an act, because it explains, qualifies, or completes it, the act itself must be evidence in the cause without the declaration; but, in the present case, dismiss the declaration, and the act itself becomes wholly irrelevant, and therefore inadmissible. It is merely arguing in a circle, first to pray in aid the declaration to make the act relevant, and then to make the declaration admissible by shewing it to be a part of the act. Another learned counsel, feeling this, has therefore more boldly asserted that in this case mere opinion as such is evidence, and that this is the expression of opinion legitimately proved as any other act. Suppose, says he, his fellow townsmen had elected Mr. Marsden to be their representative in parliament, might I not prove that fact as evidence of their opinion of his competency?

1838.

WRIGHT v. DOE d. TATHAM.

Assuming, as the argument does, that Mr. Marsden is connected with such election by no act on his part before, at the time, or after, I distinctly answer no. The question seems to me based on the fallacy, that, whatever is morally convincing, and whatever reasonable beings would form their judgments and act upon, may be submitted to a jury. The mere word of a man of character, the mere opinion of a man of experience and prudence, where by some act he vouches its sincerity, will naturally and properly influence our opinions; but the law of England requires the sanction of an oath to that which is to influence the verdict of a jury. I do not indeed concede, though it is not perhaps necessary now to decide the point, that the mere opinion of a witness, even on oath, is, as such, admissible evidence upon a question of competency. Where you can bring the decision of that question, as you sometimes may, to depend upon deductions from scientific premises, you may hear those deductions expressed as opinions by scientific men. The necessity of the case justifies this departure from the general rule; but competency, in the main, is a question of fact, and the jury are to draw their conclusion from the evidence of the facts before them, not from the opinions which others may have formed from facts not before the jury. I admit, that, in practice, where the witness to facts is present, it is by no means uncommon to ask directly for his opinion: such a question it would be idle to object to; for, the objection would only lead to a detailed inquiry into particular facts, which the witness is there ready to go into: nothing therefore would be gained by it. I am not, however, aware that this question has ever, upon argument, been decided to be correct in form. But, if it be, the argument is by no means relieved from another insuperable difficulty: if opinion, merely as such, be evidence, it cannot be proved by hearsay in the case supposed, of an election to parliament offered to prove the opinion: such election can amount to no more than this, that each elector

1838.

WRIGHT v. DOE d. TATHAM.

may be considered to say, I vote for Mr. Marsden, because I believe him to be competent: the number makes no difference. Now, proof of this declaration per se would not be legitimate evidence of the elector's opinion; and it is not made evidence by the fact that he votes in accordance: that fact, indeed, may make the declaration morally more convincing; but it is not in itself admissible, because irrelevant to the question of competency. One other case put by the same learned counsel in this part of his argument, it may be as well to notice here: Mr. Marsden had executed a bond to the late Mr. Bell, for a large sum of money lent. Proof of the execution of the bond, let in proof of all the circumstances attending the loan—that Mr. Bell had known him (with the remark that he must have thought him competent)—and that he was a very good judge of such matters. No doubt it did. The act of executing the bond was an act of Mr. Marsden's: to see what its quality was, and what inferences were to be drawn from it, it was necessary to look into all the surrounding circumstances; and, those circumstances therefore becoming evidence, it became impossible to restrain either counsel or jury from a consideration of that (namely, Mr. Bell's opinion) which in itself would not have been evidence. But it is overlooking solid distinctions thence to infer, as was attempted in argument, that it might have been shewn that Mr. Bell had made him his executor; because that would be only doing directly what in the admitted evidence in the cause had been done indirectly. Could that fact have been shewn in Mr. Bell's lifetime without calling him? If not, how would his death have made it evidence?

Upon principle, then, I think it abundantly clear, that, upon the first ground suggested, these letters are not receivable.

But we are pressed with the authority of the Ecclesiastical courts. I agree that this is a subject over which

1838.

WRIGHT v. DOE d. TATHAM.

they have jurisdiction, and with which they are in practice very conversant. I agree in the great convenience of having but one rule of evidence in every court in which the same subject-matter comes for decision: and, filled as the judgment seats in those courts are, and have been for many years, their decisions will be received by no one with more respect than by myself. I do not, therefore, presume to question the decision referred to. But, when a rule of evidence is sought to be imported thence into our courts of common law, I remember that rules of evidence are technical, framed, and wisely framed, with reference to the tribunal in which they are to be applied; and that what may be a safe rule when the same judge decides both law and fact, may be dangerous when the fact is intrusted to the jury. Other acknowledged differences as to the rules of evidence prevail between the two courts; and the same argument which is urged to-day for the admission of these letters, might be pressed to-morrow for the proof of hand-writing by direct comparison, for the examination of witnesses secretly, or for the proof of certain charges by not less than two witnesses, where the rule of the common law requires but one.

2. As to their admissibility as acts of treatment exhibited by the writers towards the testator.

I have been so full in considering the first ground on which the admissibility of these letters is rested, that I need say little on the second, the same principles being applicable to both. Treatment of another, it has been observed, is a somewhat ambiguous term; it may mean that demeanour towards a third person of which he is conscious, and which ought naturally to produce some effect on an intelligent being, to be displayed in some outward act; or it may simply refer to the agent, and exclude all consciousness on the part of the third person. It is in this latter sense that the term is here used, and in this sense treatment is at best but a demonstration of opinion; and, consequently, if I am right in the remarks that I have

1838.

WRIGHT v. DOE d. TATHAM.

made upon opinion, these letters cannot be receivable as acts of treatment.

3. As to their admissibility as accompanying and explaining acts done by the testator.

I am now brought to the consideration of the third ground taken by the counsel for the defendant below, that these letters are admissible, because they accompany and explain acts done by Mr. Marsden; in other words, that there is evidence with respect to each of these letters that Mr. Marsden had done some act, which act would in itself be relevant to and admissible upon the point in issue, his competency, and, the act itself being admissible, whatever accompanies it, and serves to explain its character, is relevant and admissible also. The principle here applied is admitted on all hands to be correct, and was laid down by the court of Queen's Bench when a new trial was granted in *Doe* d. *Tatham* v. *Wright*. The only question therefore remaining is one of fact—whether there was any evidence of such act by Mr. Marsden in regard to all or any one of these letters. It must be admitted, that the burden of affirmatively shewing such evidence rests on the party tendering the letters: it must also be admitted, I think, that on a question of competency all inferences from acts which assume the competency of the agent, are to be excluded; for, that being the matter under discussion, to assume it, and to draw any inference from such assumption which may help to prove the competency, is to reason in a circle. On the other hand, I shall freely concede that neither fraud nor the want of competency are to be presumed. Under these conditions, I examine the evidence from which I am desired to draw the conclusion that Mr. Marsden did any independent intelligent act with respect to any one of these letters. And, first, as to the letter dated in 1784, from C. Tatham. What is the evidence? It is found after the testator's death with other papers and many letters addressed to him, to some of which drafts of answers in his hand-writing are found in the same place, and others of which are indorsed in his hand-writing. The time of

Oct. 12, 1784—letter from C. Tatham to the testator.

1838.

WRIGHT v. DOE d. TATHAM.

finding is not stated; the place is a cupboard under his book-case, in his private room; the letter is found open, and the seal broken: the writer was a relation, and personally known to Mr. Marsden, and had been dead many years. Further than this, a draft of a letter from Mr. Marsden to Charles Tatham, dated in 1787, was found in the same place: this draft referred to another letter, but not to this letter, from Charles Tatham, and also to a previous letter from Mr. Marsden. These particulars are adduced in order to raise a reasonable presumption that Mr. Marsden opened and read the letter. If they raise this presumption, I do not rely upon what is undoubtedly true, that the mere competency to open and read a letter would be the logical conclusion to be drawn, and that the letter was adduced as evidence not merely of that, but of competency to make a will; but I admit that it then ought to have been submitted to the jury with the other facts in the case, as evidence of the competency in issue. But, do these particulars raise the presumption? Of all of them, there is but one which is unambiguously the act of Mr. Marsden; that is, the draft of his letter in 1787: but this makes no reference to the letter in question; and it seems to me an unwarrantable inference to draw from the fact of a letter written at an interval of three years, and referring to a previous letter, that the writer had seen and read one about which he is wholly silent. The additional fact, that the letter in question and the draft are found in the same place, cannot be drawn in to aid the inference, until it be clear that Mr. Marsden had read the letter, and deposited both, or knew of their deposit, in that place. What is the evidence of these facts? None direct; and every circumstance stated is equally consistent with the assumption of competency or incompetency. If Mr. Marsden were an intelligent man, he would have opened and read his own letters, and would probably have preserved them, if preserved at all, in such a place

1838.

WRIGHT v. DOE d. TATHAM.

as this was found in. Again, the mere facts of preservation and a common place of deposit being admitted, if he were incompetent, his manager or man of business would have opened and read his letters, and would have probably preserved them, if preserved at all, in such a place as this was found in. The facts then being consistent with either view of the case, he must fail whose duty it is affirmatively to establish either, who relies on this for proof.

Oct. 3, 1799—letter from the Rev. H. Ellershaw to the testator.

The same examination leads even more clearly to the same conclusion as to the third letter, namely, that written by Mr. Ellershaw; for, there is literally nothing as to that but the place of deposit and the company in which it is found, from which an inference is to be drawn that Mr. Marsden ever saw or read it. It is not even alleged that he was in the habit of receiving or reading letters addressed to him, or that in the whole course of his life he ever read a single letter so addressed.

May 20, 1786—letter from the Rev. O. Morton to the testator.

I come now to the second letter, about which more doubt has been entertained, although I confess it appears to me, when tried by the same tests, to present no grounds of distinction. This letter is found in the same place as the others; it relates to a matter of business on which Mr. Marsden's attorney was to be communicated with: and it bears an indorsement purporting to be of the same date with that of the letter, in the hand-writing of the attorney. It had, therefore, reached the attorney, and had been returned by him. The purpose of the letter was understood and complied with by him who opened and read it. But who was that person? or, rather, what is the affirmative evidence that Mr. Marsden was that person? Is there any thing in the evidence which is not ambiguous as to that fact, the very corner stone of the admissibility of the letter? Is there any thing which does not take its whole cogency from assuming, one way or the other, the condition of Mr. Marsden's intellect, which is the very matter under inquiry

1838.

WRIGHT v. DOE d. TATHAM.

It is said, that, to assume the intervention of a third person, is to assume fraud. I answer, that I assume no fraudulent intervention; for, the character of the intervention would depend on the condition of Mr. Marsden's mind. If he were competent, and this was his place of deposit, under his control, the interference of a third person, first to intercept, and then introduce without his knowledge into that place, a letter addressed to him, would indeed be fraudulent: but, if he were incompetent, it would be consistent with the most friendly feelings, and the most honourable principles, that some one for him should have read, acted upon, and finally deposited the letter. I conclude, therefore, that this, like the two other letters, was not shewn to be admissible.

Whether the admissibility of the letters under the circumstances was a matter to be inquired into by a court of error—*Quære.*

I desire permission, having answered your lordships' question, as it was my duty to do, to state that I am by no means satisfied that the admissibility of the letters, under the circumstances set forth, is a matter which a court of error can in any way inquire into. As at present advised, I incline to think, that, upon examination, it will appear to turn simply upon a question of fact, as to which the conduct of the judge at Nisi Prius can be reviewed only by the court out of which the record comes.

It is not, however, the time now to enter into that inquiry; and I mention this point only that I may individually not be considered as concluded with regard to it on any future occasion.

None of the letters admissible.

WILLIAMS, J.—The question submitted by your lordships, though from the difference of opinion which exists it cannot be considered as unattended with some difficulty, has been considered and reconsidered so fully that there is little chance of any new light being thrown upon it. I agree in the view which has been taken by my learned Brother who has preceded me.

I think that all the three letters contained in the bill of

1838.

WRIGHT v. DOE d. TATHAM.

exceptions are inadmissible, though with somewhat more of hesitation and doubt as to one of them than as to the two others. The circumstances of the time when and the place where they were found, are the same as to all. No time is specified as to the finding; and, though the bill of exceptions—I shall advert to this part of it hereafter—describes the place (a cupboard) to have been in the apartment of Mr. Marsden, there is no statement of his ever having been seen to use it as a place of deposit for letters, or any proof that he was in the habit of so using it.

The letters have been produced, however, and thereupon the question has arisen, and the admissibility of them has been contended for upon two heads of argument, in themselves perfectly separate and distinct; and either of which, if established, would, I admit, sustain the affirmative of the proposition contended for.

In one view of the case, the question would be of such easy solution as hardly to deserve the name. If upon the back of all or any of these letters there had been any indorsement in the hand-writing of Mr. Marsden, or if any act had been done by him avowedly in consequence of the contents, or any part of them, such letters or letter must of necessity be submitted to the jury, with a view to ascertain how far such indorsement contained any material or appropriate comment, or how far the act was consequent upon or in accordance with a fair and reasonable interpretation of the contents. The letters in such case must be admitted, or the writing and act of Mr. Marsden be rejected, which would obviously be against all reason and principle. How far, in this case, there may be any such reference to and identification of the letters, or any of them, must be considered hereafter. For the present, I shall pursue the two lines of argument (which I have before described as separate and distinct) in the order in which they were advanced.

1838.

WRIGHT v. DOE d. TATHAM.

It was contended, that, apart from all agency of Mr. Marsden, or consciousness by him, a letter addressed to him by a person of intelligence and capacity was, in itself, proof of his status as to intellect; that, if it furnished evidence of treatment, as it has been called (how he was estimated, and what was the judgment of the writer), it was more than opinion; it was opinion with an overt act attached to it, opinion acted upon; and that, to suppose that a man of undoubted understanding should address sensible observations upon any matter of business or pleasure to a known driveller and idiot, is a monstrous absurdity, and an outrage upon experience and common sense. In this view of the subject, it is obvious, as I have observed, that the agency of Mr. Marsden (in the particular transaction at least) is wholly out of the question: he need not see the letter or hear of it. If it can be shewn to have been written, and by some accident not delivered, if such delivery had been intended, the effect would be the same. The tone of the letter, according to this argument, is to be attended to; the sense of the writer, or, if the expression be preferred, the *treatment* by him of the person addressed, is every thing in this or in whatever way the argument may be presented.

As to the admissibility of the letters as declarations of the opinions of the writers, or as evidence of their treatment of the testator.

I must observe, first, that, with whatever industry and ingenuity the argument may be cloaked and disguised, it is at last resolvable into opinion, and opinion only; and that, if it be so, it is opinion presented in such a shape as makes it inadmissible for want of the sanction of an oath, under which evidence of opinion is always given; which sanction is required for this weighty reason—that opinion, however imposing from the real or supposed respectability of the person expressing it, may, after diligent and patient inquiry and examination before those to whose judgment all evidence is addressed, be deemed by them to rest upon a precarious foundation, or upon none at all.

Opinions wanting the sanction of an oath.

Next, if a letter written and addressed as above, be

1838.

WRIGHT v. DOE d. TATHAM.

Not distinguishable from statements made in conversation.

supposed to be no more than opinion—and I have already said that I think it is no more—it seems to be difficult, if not impossible, to distinguish it from a statement made in conversation respecting the understanding of any given person by another, who I will suppose possessed ample means of knowledge by acquaintance or intimacy. And, if the effect likely to be produced by it afford any criterion for ascertaining whether the evidence should be received or not, there could, I presume, be little doubt upon the subject. Morally speaking, what could be more likely to produce a strong impression and conviction than a declaration made by a person of undoubted credit and capacity respecting the state of mind of an old friend? a declaration I will imagine accompanied with all the details and particulars upon which the judgment was formed, and calculated to give it weight? Supposing such a person to be dead, but that the conversation could be detailed by another of credit equally unimpeachable, would it not inevitably (and I may add deservedly) produce a great effect in any inquiry which might be instituted respecting the capacity of the person about whom the conversation was held, and the opinion given?

The value and importance of the evidence, however, and the serious nature of the loss to the party unavoidably deprived of it, operate nothing. The cautious rules by which the rejection of evidence is determined, affect as well the most weighty opinions as the most worthless gossip, unless vouched by the indispensible sanction of an oath; a certain few and well-known cases only excepted. Moreover, it is to be observed, that it is not the matter or the manner of the party writing or speaking, but that of the party addressed, which is material when the capacity of the latter is in question. Persons may have been found whose malignity or bad taste, or in whatever manner such a character should be described, might attribute to acknowledged infirmity the possession of qualities and attainments

to which there was not the slightest pretension. Letters are sometimes addressed in tones of the deepest humility and submission, which are in substance defiance to the utmost. Until, therefore, the person addressed has acquitted himself in some manner or other, all deduction must be hazardous and precarious, all conclusion incomplete. Suppose (an illustration, if I mistake not, used at the bar) a letter or letters in Greek or Latin, of Attic or Ciceronian purity, to be addressed and sent to a given person; could his knowledge of either of those languages be inferred from that circumstance alone? or, rather, would not all judgment or opinion necessarily be suspended until it was ascertained whether he was able to make some appropriate, or at least intelligible, commentary, or (more material still) to return something like an answer?

Absence authority

Lastly, it is a circumstance of no small weight in determining my opinion upon this part of the question, that, with all the industry and ability of the learned counsel for the defendants below, no single instance has been adduced of evidence of this kind having been admitted in a court of common law. When I reflect upon the frequent occurrence of questions of this kind, and I must add the probable existence of such proof in favour of competency, I cannot account for its absence, except upon the supposition that it has been assumed and considered to be inadmissible for the purpose for which the evidence was upon the present occasion tendered.

As to the rule of evidence in the Ecclesiastical courts.

I have said that there is no instance of evidence of this sort having been received in a court of common law; and herein I beg to express my entire concurrence with the opinion of my learned Brothers (upon this point, nearly, if not wholly unanimous), that the course and practice of the Ecclesiastical courts furnish no rule for our adoption. The difference of the tribunals affords a sufficient reason for the distinction. In those courts the judge who receives the evidence is (contrary to our course) the judge

1838.

WRIGHT v. DOE d. TATHAM.

also of its effect. Whether that evidence when received be more or less stringent (as I believe their phrase is), or whether it be entitled to no weight at all, depends entirely upon the judgment of the court which first decides the question of admissibility. Whatever, therefore, may be said as to the propriety of the same rule prevailing universally, I do not think that the decisions of the Ecclesiastical courts amount to an authority in a court avowedly acting upon the rules and principles of the common law.

I come now to the second branch of the question, which is, it must be admitted, attended with more difficulty, inasmuch as it is upon this part that a different view has been taken, and in consequence of it a difference of opinion exists among the learned judges.

Letters as to which some act had been done by the testator.

The question then is, whether Mr. Marsden has in any manner identified himself with (if the expression be allowable), or, in other words, has, by any act, speech, or writing, manifested an acquaintance with and knowledge of the contents of all or any of these letters. If he has, such letter or letters must have been improperly rejected, otherwise not. And here it may not be improper to make, in passing, the remark, that every letter so recognised was without objection received, as will presently appear. The facts regarding such letters are thus stated in the bill of exceptions: "That, after the death of Mr. Marsden many letters addressed to him by various persons were found with other papers in a cupboard under his bookcase in his private room: that, to many of these letters, letters had been written and sent in answer, which last-mentioned letters were proved to be in the hand-writing and signed by him, John Marsden; and that, on some others of the letters so found, there were indorsements in the hand-writing of the said John Marsden; which letters so answered and indorsed were tendered and received in evidence upon the said matter in controversy."

I have before adverted to some of the circumstances

1838.

WRIGHT v. DOE d. TATHAM.

observable in this statement; but it is unnecessary to remark, that, if the inquiry had assumed some other shape, in which the competency of Mr. Marsden had been admitted, or not in question, instead of its being *the* question, there would have been abundantly enough to shew that he had read the letters in question, or rejected them as unworthy of perusal, and, upon the supposition just made, that he of course understood them.

Neither competency nor incompetency, or fraud, to be assumed.

But it has been argued at the bar—first, that there must be no assumption of competency or incompetency (to which I agree); that the question is as it were in abeyance until the end and final determination; that it is throughout an open question, which can only receive a decision from the fair result of all the facts and circumstances which may have been brought to bear upon the case on both sides; and that, consequently, the effect of these letters, if admitted, might be nothing, because the jury might be satisfied by the preponderance of adverse testimony that Mr. Marsden did not nor possibly could have understood all or any of them: but still that they should be received with whatever weight might properly belong to them, and form part of the case. Next, that fraud is not to be presumed, there being no statement or finding of any; and that, by consequence, any inference arising from unfair conduct in any person as to the custody or any other circumstance attending these letters, is unwarranted and inadmissible for the present purpose.

With respect to the first argument, however, it seems to me that the admissibility of the evidence must depend upon the matter in controversy, which it is stated in the bill of exceptions here, was, "whether Mr. Marsden, from his attaining to competent age, in the year 1779, down to the time of his making the will and codicil, in the years 1822 and 1825, was a person of sane mind and memory, and capable of making his will;" that some agency or cognisance of Mr. Marsden must be shewn in each particular

1838.

WRIGHT v. DOE d. TATHAM.

piece of evidence tendered, in order to make it admissible at all; and that each piece of evidence must be judged of from the circumstances applicable to itself; that, to raise any inference in favour of the admissibility of these three letters, or any of them, from certain other portions of evidence admitted and existing in the case, is a proceeding in kind, though not in degree, the same as an assumption of the entire competency of Mr. Marsden, which being granted, all difficulties vanish, and there is no question or doubt to solve; and lastly, as in this part of the argument to which I am addressing myself it was said (and I think properly), that there should be no assumption of competency one way or the other, and the matter must be considered in equilibrio, it lay upon the defendant below to give the evidence to turn the scale, and to shew affirmatively some "dealing" with these letters—to use an expression which has been before employed—or some of them, by Mr. Marsden, in order to make them admissible at all.

I come now to the presumption of fraud. That this cannot be made, and must be found, in order to form an ingredient in the argument, may well be admitted. But it is unnecessary to say more in support of that view of the subject which I have been taking, than that the presumption alluded to need not be, and I think has not been made.

Having thrown these observations together in the hope of avoiding repetition, and to compress them as much as possible, the application of them to the three letters respectively will be reduced to a narrow compass.

Charles Tatham's letter—Oct. 12, 1784.

The first is from Charles Tatham, a cousin of the said John Marsden, dated Alexandria, 12th October, 1784: as to which, as well as the two others, if treatment of Mr. Marsden had been sufficient, it is impossible to doubt that he is addressed as a person of competent understanding. With reference to that, however, which, as I have said, is in my opinion necessary to warrant its reception, there is

1838.

WRIGHT d. DOE d. TATHAM.

nothing but its being found in the place before described, open and with the seal broken. The copy of a letter from Mr. Marsden to the said Charles Tatham (received in evidence) in no respect alluded to the letter in question, nor was any thing shewn to have been said or done upon it. Suppose it had been proved, which here it was not, that Mr. Marsden broke the seal, and the issue had been whether Mr. Marsden could read or not, would the fact of breaking the seal furnish any proof of his being able to read the letter? Why should it of his being able to understand it?

Letter from Mr. Ellershaw—Oct. 3, 1799.

The next letter to be noticed, because it is open to precisely the same remarks, though not the next in order of time, is that from Mr. Ellershaw, for some time curate of the chapelry of Hornby, dated the 3rd October, 1799, and addressed to Mr. Marsden, and expressing much gratitude for many favours received. If the former letter be inadmissible, this of course must be inadmissible also.

Letter from Mr. Marton—May 20, 1786.

The third is a letter from Mr. Marton, the vicar of Lancaster, to Mr. Marsden, dated May 20th, 1786, begging that Mr. Marsden would order his attorney to wait on two persons named, to endeavour to effect a compromise in some dispute which it seems was likely to arise; and recommending a case to be drawn, by the opinion upon which both parties should be bound. And, what is more material, on the back of this letter there was an indorsement, in the hand-writing of one James Barrow, long since dead, but then the attorney of Mr. Marsden, the date of which indorsement was the said 20th May, 1786.

I have said that I have entertained somewhat more of doubt and hesitation as to this than as to the other letters, partly from the weight which has been attached to it by others for whose opinion I have great respect, and partly because there is something imposing, at first sight at least, in the fact of the letter having been found on the very day it bears date, in the very custody where, according to its

1838.

WRIGHT v. DOE d. TATHAM.

contents, it ought to have been, viz. in the possession of the attorney of Mr. Marsden; and, if it had been proved that the letter was so placed by Mr. Marsden himself in the hands of Barrow after perusal by him, no better proof would be required that he had understood and acted upon it, and that, too, a letter upon business.

But, upon consideration, it seems to me that the circumstances attending this letter are substantially not distinguishable from those attending the former. The admissibility of this letter also rests upon an implied assumption of Mr. Marsden's capacity: because he received the letter, read, and understood it, therefore he delivered it to Mr. Barrow; that is, the assumed capacity of Mr. Marsden is the foundation of the whole—the thing to be proved.

Suppose (apart from all suspicion of fraud) Mr. Marsden, not from incapacity, but indolence, had deputed his affairs generally, or this affair in particular, to his man of business, and that the latter, from previous conferences with Marton, was acquainted with the subject of the letter, and knew that Marton was about to write; why might not the man of business, upon seeing Marton's writing, have at once transmitted the letter to Barrow? or why, if Barrow, knowing Marton, and having the information above supposed, had been at Mr. Marsden's house upon the arrival of Marton's letter, might he not have taken it away with him at once? But I do not rest upon this, and mention it only in consequence of observations made upon the alleged arbitrary assumption of fraud. The foundation of my opinion is, that neither competency nor incompetency should be presumed, and that therefore the burthen was cast upon the defendant below, who tendered this piece of evidence, to give affirmatively some proof that the mind of Mr. Marsden had been exercised upon it, to make it admissible in a case where the only question was the actual state of that mind: and no such proof was given.

1838.

WRIGHT d. DOE d. TATHAM.

I think, therefore, that the judgment of the court below ought to be affirmed.

All the letters admissible.

GURNEY, B.—This is an action of ejectment brought to recover considerable estates in the county of Lancaster. It was tried at the Summer Assizes, 1836, before Mr. Baron Parke. The lessor of the plaintiff claims as heir-at-law of a gentleman of the name of Marsden, who died in the year 1826, at the age of sixty-eight.

It is stated in the bill of exceptions, that the matter in controversy was, whether Mr. Marsden, from his attaining to competent age in the year 1779, down to the time of his making the will and codicil in the years 1822 and 1825, was a person of sane mind and memory, and capable of making a will. And, to maintain the affirmative of the matter in controversy, the letters set out in the bill of exceptions were tendered in evidence.

The facts are thus stated—that, after the death of Mr. Marsden, many letters addressed to him by various persons were found with other papers in a cupboard under his book-case in a private room; that, to many of those letters, letters had been written and sent in answer, which last-mentioned letters were proved to be in the hand-writing of and signed by him, John Marsden; and that, upon some others of the letters so found, there were indorsements in the hand-writing of the said John Marsden; which letters, so answered and indorsed, were tendered and received in evidence upon the said matter in controversy.

It appears, therefore, that Mr. Marsden had a private room, and in a cupboard under his book-case in that room were found letters of various descriptions: some to which he had given answers; and these letters and answers were read in evidence: some which he had indorsed; these, too, were read in evidence: and the three letters in question, upon which there were no indorsements written by

1838.

WRIGHT v. DOE d. TATHAM.

him, and to which there were no answers produced. One of those letters was written in the year 1799, by the Rev. Henry Ellershaw, who had been for many years perpetual curate of Hornby, Mr. Marsden's parish, to which curacy he had been presented by Mr. Marsden; it was written, in the presence of his assistant, upon the occasion of his relinquishing that preferment. The second was written by Charles Tatham, the brother of the lessor of the plaintiff, on his arrival in America. And the third, by the Rev. Oliver Marton, vicar of Lancaster.

Oct. 3, 1799—letter from the Rev. H. Ellershaw to the testator.

All the transactions of Mr. Marsden's life were subjected to the view and consideration of the jury, to enable them to form their judgment of the competency of his mind; all that he said, all that he did, and all that under certain circumstances he omitted to say and do. It appears to me that the transactions connected with this, which I think must be taken to be Mr. Marsden's depository of papers and letters, afford no insignificant means of judging of his competency. If the letters had been found with the seals unbroken, that might have afforded evidence of a total want of curiosity, if not of imbecility of mind. The finding them with the seals broken, is, I think, primâ facie evidence that they had been opened and read by him to whom they were addressed, and in whose depository they were found. It is said that this supposition is founded on a presumption of competency, which is the question to be tried. But, when it is stated that these unindorsed and unanswered letters were found in company with some letters which were indorsed by Mr. Marsden, and with others which were answered by him, and the letters in his own hand are produced and read, I do not see that it is forming any presumption of his competency, to assume that the seals had been broken and the letters read by him: it appears to me that it is only from a presumption that any other inference is to be drawn.

It has been said in argument that it is not stated how

1838.

WRIGHT d. DOE d. TATHAM.

soon after his death these letters were found. If it had been intended by the counsel for the lessor of the plaintiff to use any argument of that kind, he should have shewn, if he could, by cross-examination, that the distance of time was such as to weaken or destroy the inference that they had been placed there by the testator.

It is further said, that it is not found that no other person used the room. But it is found to be his private room.

It is said, that it is not found that Mr. Marsden wrote the indorsements, and the answers which are mentioned, without the tutorage of another. But that should have been shewn, if it could have been shewn, to affect the reception of this evidence. It is sufficient that the letters are found in such a place and in such company. The question is not, what is the weight of the evidence when received; the question is not, whether any supicious circumstances may or may not attach to it: all that is matter of observation for the jury. If any facts could be introduced to raise a suspicion that these letters were foisted into this place by any other person than Mr. Marsden, they would doubtless have their effect where they ought to have it; but nothing of that sort is stated. The letters bear every mark of genuineness: they were written at periods very remote, when no question of the competency of this gentleman had arisen: they were written by persons well acquainted with him, and these persons were dead long before this question arose. I think therefore that the contents of this repository are evidence—evidence of more or less value, according as they are fairly or unfairly laid before the jury.

Again, it is asked, who knows that these letters were deposited in this cupboard by Mr. Marsden? I think that the company in which they were found is primâ facie evidence that they were deposited by him. They were found in the same place with the letters which he had indorsed, and the letters he had answered. It was matter of inquiry

1838.

WRIGHT v. DOE d. TATHAM.

for the jury whether any other person was likely to have deposited them there, whether any other person used or sat in that room, whether the letters produced were all the letters found, or whether garbled.

On an indictment for high treason, letters with the seals broken, in the possession of the person indicted, are evidence against him, although there be no indorsement of his, and no letter of his in answer; because the presumption is, that, the seals having been broken, he has perused the letters. So, here, I think that the finding them raises the same presumption, and that it is not a sufficient answer that this is a question of competency.

These observations appear to justify the reception of the letter of Mr. Ellershaw.

Oct. 12, 1784—letter from C. Tatham to the testator.

Upon the other two letters, the argument for their reception is much stronger. First, the letter of Charles Tatham. It appears, that, in 1784, Charles Tatham went to America; and on his arrival he wrote this letter to Mr. Marsden, which bears the mark of a ship-letter, and has the post-mark. If nothing more appeared, it would stand upon the same footing as the letter of Mr. Ellershaw. But, further, there was found among the papers of Mr. Marsden, a draft of a letter from Mr. Marsden himself to Charles Tatham, dated in June, 1787, which proves that these parties had been from the year 1784 till that time in a course of correspondence; for, he says, "I received your letter some time ago, wherein you mentioned that you have sent me a map of the United States of America. I deferred writing till such time as I had made inquiry after it, but did not get the map until the 7th instant. You mention in your letter that you had sent me a small parcel of dried fruits; I received nothing but the map, for which I am obliged to you. I suppose you have received my last letter, wherein you will see an account of your nurse's death."

Draft or copy

It is objected that this draft of a letter does not make

1838.

WRIGHT v. DOE d. TATHAM.

the letter of 1784 evidence, because it is not an answer to that specific letter. I cannot see the difference between a letter which acknowledges another of a series of correspondence, and a letter which acknowledges the letter in question. If it had acknowledged both together, that, it is admitted, would have made it evidence. If the draft had been, "My dear cousin—I have received your letter of the 12th of October, 1784," and nothing more, that would have made it evidence. But his answering another letter of the series, commenting upon the terms of the letter, acknowledging the receipt of one thing, and noticing the non-receipt of another which ought to have accompanied it, &c., &c., that does not make it evidence, because it refers to a later letter of the series. The distinction appears to me to be too refined. It is further objected that the letter was addressed to Mr. Marsden at Wennington Hall, where he then resided, and that it was found at Hornby Castle, to which he had removed from Wennington Hall, and at which he had resided for many years before his death, and that that weakens the presumption that it was placed in this cupboard by Mr. Marsden. So far from weakening it, it appears to me to strengthen that presumption. It is in the natural course of things that a gentleman should remove his private papers when he removes his residence.

of letter from the testator to C. Tatham.

Lastly, there is the letter of the Rev. Oliver Marton, the vicar of Lancaster, the county town, a few miles from which Mr. Marsden lived, written to him on business requiring professional assistance, requesting that Mr. Marsden would order his attorney to wait on one of two gentlemen, who are named, to propose terms of agreement between himself and the parish; recommending that a case should be settled by the two attornies and laid before counsel. This letter written fifty-two years ago, by a gentleman intimately acquainted with Mr. Marsden, is found to have been in the hands of Mr. Barrow, the attor-

May 20, 1786 —letter from the Rev. O. Marton to the testator.

1838.

WRIGHT v. DOE d. TATHAM.

ney of Mr. Marsden, also resident at Lancaster, who has been dead thirty-five years; and there is an indorsement on the back of the letter in the hand-writing of Mr. Barrow—"20th May, 1786, letter from Mr. Marsden." It is objected that this letter is not evidence, because it is not proved, first, that the letter was received by Mr. Marsden, secondly, that it was by him shewn to Mr. Barrow, thirdly, how it came back into the hands of Mr. Marsden, fourthly, when Mr. Barrow made that indorsement, and fifthly, that it was placed in this cupboard by Mr. Marsden.

I think that these observations are applicable only to the effect of the evidence when produced, not to its production; they are to be addressed to the jury. To require such proof of events that occurred half a century ago, is to require impossibilities. The only persons who could have given it have been long in their graves. The legitimate inferences to be drawn from this letter thus indorsed, are, that the letter was received by Mr. Marsden; that he did, either personally or by letter, consult Mr. Barrow on the subject; that Mr. Barrow had the letter under his consideration, and returned it to Mr. Marsden with the advice which he thought proper to give upon it. That is the natural and ordinary course of things; and I do not think that we are called upon to presume every thing that is forced and unnatural, to exclude evidence from the consideration of the jury.

The answer, therefore, which I humbly give to the question propounded by your lordships, is, that all the three letters should have been received in evidence.

None of the letters admissible.

PATTESON, J.—In answer to your lordships' question in this case, I have to state, that, in my opinion, none of the letters tendered were, under the circumstances, admissible in evidence.

The issue in this case embraced the consideration of Mr. Marsden's state of mind during the whole of a long life;

1868.

WRIGHT v. DOE d. TATHAM.

and, as it seems to me, every act of that long life might be shewn and was relevant to the proper determination of that issue.

Grounds upon which the letters are offered in evidence.

The letters in question are proposed as evidence on one of two grounds—first, as shewing the opinion of the writers, and the mode of treatment which they adopted to Mr. Marsden—secondly, as connected with Mr. Marsden's own conduct in regard to the letters, and explanatory of that conduct. The first ground is indeed not very strongly, if at all, insisted on, so far as it rests on the mere opinion of the writers, independent of any communication of that opinion to Mr. Marsden: but it is insisted on as a mode of treatment of him since the letters were addressed to him. Now, if it be conceded, as I think it must, that the mere opinion of a deceased writer as to the competency of another person, not given upon oath, nor under circumstances which afford the parties to be affected by that opinion any means of inquiring into the reasons on which it was adopted, or the facts on which it was founded, cannot be held admissible, I am quite at a loss to see how the circumstance of that opinion being contained in a letter addressed to the individual respecting whose competency the inquiry is instituted, can make any difference. It shews, after all, nothing but the opinion of the writer, and the sort of treatment which he adopts towards the party; but it does not in the least tend to enable a jury to judge whether that opinion was right, or that treatment proper; it cannot have any weight, unless it be some which is derived from the authority of the writer; and it ought not on that ground to influence or even to be laid before a jury. The conduct of the individual whose competency is in dispute, under such treatment by others, is that alone which can enable a jury to judge as to the propriety of that treatment; and it is that conduct (which is in truth the admissible evidence), and not the treatment, which is proper and necessary to be laid before the jury, in order to enable

1838.

WRIGHT v. DOE d. TATHAM.

them to understand and appreciate the conduct of the individual, and for that purpose only.

Principle upon which alone evidence of this sort admissible.

The second ground is, as it seems to me, the real ground on which the admissibility of the evidence in question is sought to be established. Upon this I believe that no difference of opinion will be found to exist as to the principle on which such evidence is admissible. Every act of the party's life is relevant to the issue; of course, therefore, any thing which he can be shewn to have done in regard to any written document, being evidence, it follows that such written document must itself be received; otherwise, the true character of the act which he has done in regard to it cannot be properly estimated, or the jury be enabled to judge how far that act is or is not indicative of the state of his mind.

In every case, therefore, the first point to be considered will be, whether any act has in truth been done by the party in regard to the document proposed to be given in evidence. Now, without stopping to consider how far the determination of the judge at the trial upon this point (which is a question of fact, and may perhaps depend on conflicting testimony, and as I apprehend can only be submitted to the jury,) can be made the subject of a bill of exceptions, or in any other manner can be subjected to a revision, I proceed to consider the circumstances under which each of the three letters in question was tendered: concerning them, your lordships' question calls upon me to give such an opinion as I should have given had such a point arisen upon a trial before me.

It is material to recollect the issue in this cause, viz. the competency or incompetency of Mr. Marsden; because I apprehend it to be essential, that, upon the trial of every issue, evidence should not be received which is based on any presumption one way or the other involving the subject-matter of that issue.

The place in which the letters were found does not, in

1838.

WRIGHT v. DOE d. TATHAM.

my judgment, furnish any argument, for it does not appear to have been one in which Mr. Marsden himself was in the habit of depositing papers, or which he kept private to himself, or was accustomed to examine. They are found in company with other papers on which he had written different matters; which circumstance, so far from shewing that he had read and understood the letters in question, rather tends the other way, from the absence of any writing of his upon them. The seals being broken seems to be wholly immaterial, since it does not appear by whom that was done. Nor, indeed, would the breaking of the seals afford any criterion as to the state of mind of the person who was proved to have broken them. These circumstances are common to all the letters. I come now to consider those which are peculiar to each letter.

Oct. 12, 1784—letter from C. Tatham to the testator.

The first of them is from a Mr. Charles Tatham, dated Alexandria, 12th October, 1784. No writing of Mr. Marsden's appears upon it, nor is any answer to it found, nor is allusion made to the contents of it in any writing of Mr. Marsden. But a copy of a letter from Mr. Marsden to Mr. Charles Tatham, in the hand-writing of the former, bearing date June 1st, 1787, was given in evidence, which refers to some other letter received from Mr. Charles Tatham; and therefore it is insisted that the former letter of the 12th October, 1784, which is not referred to by Mr. Marsden, is to be received as part of a correspondence. It seems to me that this argument is founded on a mistaken view of the principle on which the letters can be admitted at all. If a correspondence be adduced in evidence to establish the existence of certain facts, or the knowledge of those facts by any individual, or the admission of their truth by that individual, unquestionably the whole of the correspondence must be read; and the circumstance of one letter not being noticed by the person to whom it is addressed, may not exclude it. But, where the object of the evidence is, to establish that the individual to whom

1838.

WRIGHT v. DOE d. TATHAM.

the letter is addressed had a mind capable of understanding the contents of the letter, it seems to me that it is necessary to bring each particular letter, whether it be part of a correspondence or not, as it were, under the eye of the individual; for, he may have been capable of understanding one letter and not another, or he may have been capable at one time and not at another. The interval of time between 1784 and 1787 is considerable, and the letter, a copy of the answer to which is given in evidence, is not found: there is, therefore, nothing to shew that Mr. Marsden ever dealt with the letter of 1784 in any way; and I think it was properly rejected.

May 20, 1786 —letter from the Rev. O. Marton to the testator.

The next letter is that of Mr. Oliver Marton, dated the 20th May, 1786. It requests Mr. Marsden to direct his attorney to wait on a Mr. Atkinson; and it has the words "20th May, 1786, letter from Mr. Marton to Mr. Marsden," indorsed on it, in the hand-writing of Mr. Marsden's then attorney, Mr. Barrow. No direct evidence is given to shew that this letter ever passed through Mr. Marsden's hands, or that he ever dealt with it in any way. But it is said that it must be presumed that the letter was sent by Mr. Marsden to his attorney, inasmuch as the letter itself requests him to communicate with his attorney, and inasmuch as the attorney has written upon it, and because such would be the ordinary course of dealing with such a letter. Now, with all possible respect for the opinion of others, I confess that such reasoning seems to me to be nothing other than petitio principii—reasoning in a circle. The question at issue is, whether Mr. Marsden was a competent person—whether he could and did deal with ordinary matters in the ordinary course; and, in order to render this letter evidence in support of the affirmative of that proposition, by reason of his having read and dealt with it, a presumption is sought to be made that he did see and deal with this letter, because a competent person, in the ordinary course of events, would have so done. It seems

1838.

WRIGHT v. DOE d. TATHAM.

to me that no such presumption ought to be made, nor, indeed, any presumption whatever; but that, in order to let in any letter of another person as evidence, direct and positive proof of the party to whom it is addressed having dealt with it, must be required. If, indeed, the exclusion of this letter rested on any presumption of incompetency in the party to whom it is addressed, or of fraud in those about him, I fully agree that it ought not to be excluded, because no such presumption ought to be made. But the exclusion of the letter does not, in my judgment, rest on any such ground. Mr. Marsden, whether he was a competent person or not, may have employed some one as his secretary to open his letters and to transact business for him, from various motives; and that may have been done in this and in many other instances without any fraud of any sort. The point to be established, in order to render this letter admissible, is, that Mr. Marsden *personally* dealt with it; and that point ought not, as it seems to me, upon this issue, to rest upon presumption of any sort, but solely upon direct and positive testimony.

Oct. 3, 1799—letter from the Rev. H. Ellershaw to the testator.

The last letter is one from the Rev. Mr. Ellershaw to Mr. Marsden, written on occasion of his relinquishing the cure of his parish. I am wholly at a loss to guess upon what ground this letter is tendered, unless it be as containing the opinion of the writer, or as shewing his mode of treating Mr. Marsden. I have already stated to your lordships my opinion that no letter is admissible upon such ground; and it is not pretended that this letter has been dealt with by Mr. Marsden.

As to the rule of evidence in the Ecclesiastical courts.

I have only, in conclusion, to notice the cases which have been cited as decided in the Ecclesiastical courts, in which it is said that letters of members of the family not dealt with by or even communicated to the person whose sanity was in dispute, have been received as evidence of the treatment adopted towards him by those who knew him, and so, as being relevant to the issue.

1838.

WRIGHT v. DOE d. TATHAM.

Whether the admission of such evidence be attributable to any peculiar rule of those courts, or to the circumstance that the same person there decides upon questions both of law and fact, I cannot tell; but I am quite unable to see any sound principle on which they can be admitted; and, however much I may regret that any different views of evidence should prevail in different courts, I cannot consider those cases as binding authorities even in the courts of common law in Westminster Hall, much less in your lordships' house.

None of the letters admissible.

ALDERSON, B.—After fully considering the question which your lordships have put to the judges, I have also arrived at the conclusion that all the three letters ought to be rejected as evidence upon the trial in question. These letters were addressed to the testator by persons acquainted with him, and whose opinion as to his capacity, if properly proved, would be received as evidence in the cause.

Matter of opinion proved.

But the point to be considered first, is, how that which is matter of opinion is to be proved. I conceive that it is to be proved, like any other fact, by evidence on oath given in open court.

The law of England, so far as I know, makes no distinction between such opinion and any other material fact. The general rule is, that facts are to be proved by testimony of persons on oath, and subjected to cross-examination. There are, no doubt, exceptions to this rule, in which hearsay evidence is admissible. One such exception is to be found in the case of public rights. There, the general interest which belongs to the subject would lead to immediate contradiction from others, unless the statement proved were true, and the public nature of the right excludes the probability of individual bias, and makes the sanction of an oath less necessary. Again, the case of dying declarations—which is however confined to homi-

cide—is another exception to the rule. But these exceptions, and the principles which govern them, are wholly inapplicable to a case like the present.

If, therefore, the letters are to be used as proofs of the opinion of the writers respecting Mr. Marsden's capacity, the objection to their admissibility is, that this opinion is not upon oath, nor is it possible for the opposite party to test by cross-examination the foundation on which it rests.

Object of the proposed evidence.

The object of laying such testimony before the jury, is, to place the whole life and conduct of the testator, if possible, before them, so that they may judge of his capacity: for this purpose, you call persons who have known him for years, who have seen him frequently, who have conversed with him or corresponded with him. After having thus ascertained their means of knowledge, the question is put generally as to their opinion of his capacity. I conceive this question really means to involve an inquiry as to the effect of all the acts which the witnesses have seen the testator do for a long series of years, and the manner in which he was during that period treated by those with whom he was living in familiar intercourse. This is not properly opinion, like that of experts; but is rather a compendious mode of putting one instead of a multitude of questions to the witness under examination, as to the acts and conduct of the testator.

Instances of such questions are not uncommon. A witness in a case of assault is frequently asked his opinion which of the two, the plaintiff or defendant, began the affray: no one considers the opinion of a witness in such a case as evidence; but, when it is obvious that he has seen the whole, and can, if required, state all the circumstances in detail, such a compendious mode of putting the question is often allowed without objection. But there, the real meaning of the question is, what were the circumstances of the transaction: and, unless the witness be then

1838.

WRIGHT v. DOE d. TATHAM.

capable of deposing to them, the opinion could not be received at all.

A letter, therefore, as a mere opinion, is not evidence at all; for, it cannot give these sanctions. If it were receivable, a letter to a third person, or an oral declaration to a third person, would be evidence equally. But no one has contended that these are receivable. I conceive, therefore, that these letters are not receivable upon this ground: nor are they receivable as being what has been called treatment—of which however I do not profess to understand the meaning: nor like conversations addressed or acts done to Mr. Marsden in his presence, and of which he is proved to be cognisant.

Of course, the mere circumstance that the conversation was in writing would make no difference; and I agree that conversation addressed to Mr. Marsden, or conduct towards him, would have been evidenceif he were shewn to be cognisant of it. But, why? Because it explains and illustrates his conduct—which is in effect an act done by him—in hearing the one and receiving the other. His manner at the time—even though he made no answer—would be proper to be left to the jury. But a letter is like a conversation in which you have no such accompanying conduct to be explained and illustrated. It is like conversation addressed to a man when asleep or intoxicated, or which he did not hear; or conduct towards him in his absence; which would not be admissible.

But then, lastly, it is said that the letters are receivable as having been acted upon by the testator, and as explanatory of his acts; and, if that were the case, I should agree in the conclusion. Every act of the testator is evidence; and, if these are letters which qualify or illustrate or explain any act of his, they are receivable. But then, the first step to be taken is, to shew some act of the testator, by clear evidence, for, that is the foundation of the whole. Here, that step wholly fails: this is an attempt to raise a

1838.

WRIGHT v. DOE d. TATHAM.

superstructure which has nothing to support it. If the testator had made an indorsement on any one of them, the contents of the letter would have been receivable. But, why? Only for the purpose of shewing that the indorsement was a rational act, not for the purpose of shewing the opinion of the writer. If an answer to the letter had been sent by him, the letter is in like manner receivable to shew the rationality of such answer. But what act is there here? As to the letter of Charles Tatham, it is, as it seems to me, wholly unconnected with the draft of the letter mentioned in the case, and which is in the testator's hand-writing. There is no indorsement on it by the testator. The same observations apply to Mr. Ellershaw's letter.

As to the circumstances under which the letters were found.

The only other circumstance relied on as to these two letters, is, that they are found open, in a cupboard under the testator's book-case, with other letters bearing his indorsements on them; and it is contended that this proves an act of the testator in opening and putting them there. Letters found in such a situation are no doubt evidence against a party accused criminally, or civilly charged, and he is presumed cognisant of their contents. But that is on the tacit supposition that he is a man of sound mind. To make such a supposition here, is to beg the question which is to be proved—a vicious mode of reasoning in a circle. Where the question is doubtful, whether a man be or be not of competent understanding, no acts the proof of the existence of which entirely depends on such inference can be relied on at all.

Here, the judge, reasoning on the subject, may be supposed to have said: "If Mr. Marsden were capable, he opened the letters and placed them there; if not, some one else did those acts. But the nature of this question precludes me from saying whether he was capable or not. Therefore, I cannot say whether he did the act or not; but the party who propounds the letters must prove that

1838.

WRIGHT v. DOE d. TATHAM.

before I can receive them." It seems to me that the judge in so reasoning would reason rightly.

The same observation applies to Mr. Marton's letter: Mr. Barrow's indorsement only proves that it was in his (Barrow's) custody for the purpose of being acted on. Now, if Mr. Marsden was capable, we ought to infer that he had sent or caused that letter to be sent to Mr. Barrow. If Mr. Marsden was incapable, we ought to conclude that some other person acting on his behalf had sent it to Mr. Barrow. The fact of its being in Mr. Barrow's possession is equally consistent with either supposition; and therefore when it is the question whether Mr. Marsden were capable or not, the foundation that the indorsement of Mr. Barrow necessarily proves an act done by Mr. Marsden, fails altogether. And, if no act be proved to be done, then the contents of the letter, which are only admissible to explain an act, are not receivable at all.

Upon the whole, I think the question put by your lordships ought to be answered in the negative. And the view I take of the nature of such evidence makes me very anxious that the rule should be so established; for, I feel convinced that it always passes current for far more than its real value, which is very trifling, and is above all other evidence likely to lead a tribunal constituted like a jury to the most erroneous result.

It is clear, that, in this case, those who propose these letters as evidence, do it only for the purpose of laying the opinion of the writers before the jury; a point which I believe all the judges are unanimous in thinking they are not receivable to prove.

None of the letters admissible.

BOSANQUET, J.—Having fully expressed my opinion in the case which has been laid before your lordships, that all the three letters in question are inadmissible in evidence, I forbear, out of respect to your lordships, from detaining the House by repeating at any length the reasons upon which that opinion is founded.

1838.

WRIGHT v. DOE d. TATHAM.

After hearing the argument at your lordships' bar, and reconsidering the subject, I adhere to the opinion which I delivered in the court of Exchequer Chamber, the substantial grounds of which may be thus shortly stated:— The opinions of deceased persons, acquainted with the testator, respecting his sanity, however distinctly expressed, are not receivable in evidence, unless given upon oath in the course of a judicial proceeding. The letters and acts of such persons, from which their opinion may be inferred, cannot amount to more than opinion positively stated, unless they afford occasion to the testator of manifesting his own conduct or deportment respecting them. Every thing spoken to or read by the testator, and every act done in his sight or hearing, may afford an important inference of his capacity or incapacity; but the acts of individuals to which he is not a party, can lead to no conclusion beyond that of the agent entertaining a certain opinion or conviction of the testator's state of mind. No one of the letters is expressly proved to have been opened by the testator, or in any way recognised by him. They were all found, indeed, in a place where a rational man might be supposed to have placed them; but, before any inference as to his capacity can thence be drawn respecting the testator, it must be assumed that he acted rationally. A man in his sound mind would probably have placed the letters where they were found after the testator's death; but, as the question to be tried is, whether he was of sound mind or not, it is arguing in a circle to say that the testator must be supposed to have placed the letters in a particular place, because a man of sound mind would have done so; and thence to infer that he was of sound mind, because he disposed of his letters in a rational manner. A distinction, however, has been insisted upon respecting the letter addressed to the testator by Mr. Marton, because the contents of the letter appear to have been acted upon; the letter having contained a request that the testator would

1838.

WRIGHT v. DOE d. TATHAM.

order his attorney to take some step for the purpose of proposing an arrangement between the testator and the parish, and the letter having been found indorsed by the attorney, who must therefore have received it. But, in my opinion, the objection already stated applies to this letter as well as to the others. If it be to be inferred that the testator delivered the letter to his attorney, his doing so affords evidence of his capacity to understand the letter; but, until it be shewn by some evidence beyond the contents of the letter, that it came to the hands of the attorney by the act of the testator, the admissibility of the letter in evidence must be open to precisely the same objection as that which applies to the letters found in his private apartment. Who placed the letters in that apartment, and who delivered Mr. Marton's letter to the attorney, are questions the answers to which depend upon the inference to be drawn from a supposed sound state of mind; and, as the existence or non-existence of that state of mind is the matter in issue, no legitimate conclusion can be drawn from assuming either one alternative or the other.

As to the rule of evidence in the Ecclesiastical courts.

The practice of the Ecclesiastical courts relied upon by the defendant below, however adapted to the constitution of those courts, appears to me to be at variance with the principles of evidence by which the courts of common law are governed, and not to be binding upon them.

For these reasons, therefore, without further detaining your lordships, the answer which I have humbly to give to your lordships' question, is, that no one of the letters was admissible on behalf of the defendant below.

BOLLAND, B.—The question proposed for the opinion of the judges, is, whether three letters tendered in evidence in an action of ejectment in which the defendant in error was the plaintiff below, and the plaintiff in error was the defendant below, and which letters were rejected by the learned judge, were any or either of them admissible.

1838.

WRIGHT v. DOE d. TATHAM.

The matter in issue between the parties was, the validity of a will and codicil under which the defendant in the action claimed; and it became and was a matter in controversy whether or not John Marsden was and had been from his attaining to competent age in the year 1779, down to, and at the time of his making the will and codicil in question in the years 1822 and 1825 respectively, a person of sane mind and memory, and capable of disposing of his property by will. As evidence to maintain the affirmative, the counsel for the defendant proved, that, after the death of the said John Marsden, many letters addressed to him by various persons were found with other papers in a cupboard under his book-case in his private room; that, to many of these letters, answers had been written and sent, in the hand-writing of and signed by the said John Marsden; and that, upon some others of the letters so found, there were indorsements in the hand-writing of the said John Marsden. The letters so answered and so indorsed were tendered and received in evidence at the trial. Amongst the letters so found there were three letters upon the admissibility of which the opinion of the judges is required by your lordships. It will be convenient to set out the letters, and afterwards to observe upon the evidence by which the counsel for the defendant contended for their reception. The first was a letter addressed to the said John Marsden by one Charles Tatham, the brother of the lessor of the plaintiff in the action, and a cousin of the said John Marsden; that letter is in these words [the learned Baron read the letter]. The second was a letter addressed to the said John Marsden at Wennington Hall by one Oliver Marton [the learned Baron read it]. The third was a letter from Henry Ellershaw [the learned Baron read it]. In order to establish the authenticity of the letter from Charles Tatham, the defendant proved that it was marked with the London post-mark as a ship-letter; that it was in the hand-writing

C. Tatham's letter.

1838.

WRIGHT v. DOE d. TATHAM.

of Charles Tatham, and addressed to John Marsden, Esq., Wennington Hall, where he then resided; that Charles Tatham was personally acquainted with the said John Marsden, and at the time of the trial had been dead many years. In order to shew, in addition to the evidence of the place where the letter was found, that the letter had come to the knowledge of John Marsden, and had been dealt with by him, the defendant produced and read the copy of a letter from the said John Marsden to the said Charles Tatham, found amongst the papers of the said John Marsden, and in his hand-writing; that letter was in these words [the learned Baron read it].

The Rev. O. Marton's letter.

Now, from the evidence given by the defendant respecting the second letter, it appears that Oliver Marton, the writer of it, was at its date the vicar of Lancaster, a town about eleven miles distant from the then residence of the said John Marsden; that he was acquainted with the said John Marsden; that he had been dead upwards of thirty years; and that an indorsement upon the letter in the words and figures "20th May, 1786, letter from Mr. Marton to Mr. Marsden," was in the hand-writing of one James Barrow, who had been dead thirty-five years, and who, at the time of the date of the letter, was the attorney of Mr. Marsden.

The Rev. H. Ellershaw's letter.

It also appears from the evidence given on the part of the defendant respecting the third letter, that the said Henry Ellershaw had been for several years the curate of the chapelry of Hornby, to which he had been appointed by the said John Marsden as patron of the said chapelry; that he had been dead some years; that the letter was in his hand-writing; and that it had been written by him in the presence of the Rev. John Garnett, his assistant, when he the said Henry Ellershaw was about relinquishing his preferment. All the three letters were found open, and with their seals broken.

Now, my lords, connected as I have been with the

1838.

WRIGHT v. DOE d. TATHAM.

inquiry out of which the question proposed for decision arises, in having been twice examined as a witness on the trial of the action of ejectment on the part of the defendant, to establish the competency of Mr. Marsden at the time I knew him to make the will in dispute, and as my acquaintance with him, and my opoprtunities of forming an opinion of the state of his mind, and the extent of his capacity, included the period at which the last of the three letters was written, I find myself placed in a difficult position. It is no easy task for me to look at the question in the abstract, independently of my conviction of the capability of Mr. Marsden to understand these letters, and to deal with them as their contents called upon him to do. I shall, however, in the opinion I deliver, endeavour strictly to do so.

Rule by which the reception of the letters must be governed.

To determine this question it will be right to consider what are the rules which are to be applied, and by which we are to be guided. I take it to be settled, that, in order to shew the state of mind and understanding of a person whose competency, as in the present case, is brought in question, whatever is said, written, or done by the friends of the party, and others who may have had transactions with him, is evidence to be submitted to the jury who are to decide upon such competency, provided what has been so said, written, or done, can be proved to have been known to and acted upon by such party.

As to the rule of evidence in the Ecclesiastical courts.

Now, in confining myself to this rule, I do not mean to be understood as having lost sight of the position put forward and strongly relied on by the learned counsel for the defendant below, that the conduct of others toward and respecting the testator, although not amounting to conduct personal to him, may be used in support of the admissibility of these letters; nor to have passed over without notice the practice of the Ecclesiastical courts in reference to evidence of that description; or not to have given due weight to the high authority of the very learned

1838.

WRIGHT v. DOE d. TATHAM.

judge of the Prerogative Court, Sir John Nicholl, in the judgments delivered by him in the cases of *Wheeler and Batsford* v. *Alderson*, 3 Haggard's Ecclesiastical Reports, 609, and *Watts* v. *Howlett*, 3 Hagg. 790, and the fuller report of the judgment in the latter case, in 1 Ad. & El. 8. Although I cannot adopt the entire repudiation of such evidence in our courts of common law, as some of my learned Brethren in their judgments in a former stage of the proceedings in this cause have done, yet, as my opinion proceeds upon grounds within the limit of the rule upon the application of which there can be no doubt, it will not be necessary to consider whether or not the practice of the Ecclesiastical courts of admitting such evidence can be legally adopted to the full or any extent in a court of common law.

Under these circumstances, the question therefore is, whether the place in which these letters were found, the various other letters and papers with which they were found, and the state in which such papers and letters were, and the other proofs relied on as shewing a dealing with the three letters by Mr. Marsden, were sufficient to make them, or either of them, admissible in evidence.

That I may put this question into a proper state for consideration, it is necessary to look at it as untainted with any fraud or sinister contrivance whatever, either as to the place where the letters were found, the accompanying papers and letters with which they were found, and the state in which the three letters were at the time of their discovery.

All the letters admissible.

Considering all the circumstances surrounding them, and looking, in addition, to the contents of the letters themselves, it appears to me that they were all of them receivable in evidence. The evidence respecting them which applies in common to the three, are, the place and company in which they were found, and their being in the hand-writing of the persons from whom they purport to

1838.

WRIGHT v. DOE d. TATHAM.

have come, their being addressed to Mr. Marsden, and their being found open, with their seals broken. As to the place where they were found, it was a cupboard under the book-case in the private room of Mr. Marsden; and the letters were found open. Where could papers belonging to a private country gentleman have been more naturally looked for? But it is suggested they might have been thrown there unnoticed and unread. Is this to be presumed, when the company in which they are found, and the fact of their being open, rebuts the inference? Papers found in the possession of persons charged with conspiracy and treason have been given in evidence against them; the presumption being that they had been read, and that the contents were known to the parties. In the present case, there have been further and more decisive acts done. The letters are found with their seals broken; and the other letters found with them shew that Mr. Marsden, by the indorsements in his own hand-writing upon several of them, was perfectly competent to mark and register his having dealt with them; and such letters so indorsed by him were admitted and read: but, on account of the absence of similar indorsements on the letters in question, they were rejected. If no other proof of Mr. Marsden having dealt with these letters had been given, I submit it was amply sufficient to call upon the learned judge to lay them before the jury: but there are other reasons arising out of the letters themselves, and other facts applicable to each respectively, that appear to me to fortify this opinion, and place the matter beyond the reach of doubt.

Letter of 1784—from C. Tatham to the testator.

I will take each letter separately. The first is that written in 1784, by Charles Tatham, the brother of the lessor of the plaintiff. It is a letter couched in terms of friendship, written by a cousin who was well acquainted with the testator. It inquires affectionately after several members of his family who were living under the roof of Mr. Marsden. Mr. Marsden is addressed in the language

1838.

WRIGHT v. DOE d. TATHAM.

of respect; not an expression is contained in it shewing that the writer considered him other than a person of intellect equal to his own. The relationship in which he stood would have prevented him so treating Mr. Marsden if he had considered him of weak and imbecile mind, and incapable of managing his own affairs. He was the brother of the lessor of the plaintiff, who claims as the heir-at-law of Mr. Marsden; and, although it does not appear whether older or not than his brother, he had a deep interest in the incompetency of Mr. Marsden to make a will, if such incompetency existed. The letter of Mr. Marsden to Charles Tatham, contains proof sufficient to satisfy me that Mr. Marsden had dealt with his cousin's letter. That he corresponded with him, is clear. It acknowledges the receipt of a map from him; in it he mentions a former letter that he (Mr. Marsden) had written to him with an account of his nurse's death; and in allusion to and noticticing the kind expressions in the postscript of Charles Tatham's letter—"Pray give my kind love to my aunt, my brother, and my cousin Betty"—Mr. Marsden in his letter to him says—"My aunt has had very poor health since you left England; she has scarce ever been well; I am in hopes that she is getting better again. I think that change of air and a journey would be of service to her. We had an account of poor Mrs. Smith's death; she died at St. Alban's on the 7th instant. My aunt has had a letter from your brother Harry; he is very well." Now, I cannot read this letter without considering this part of it as intended by Mr. Marsden to be and as amounting to an acknowledgment of the letter of 1784.

Letter of 1786—from Mr. Marton to the testator.

The next letter in point of date is that of Mr. Marton, in 1786. The writer was at that time the vicar of Lancaster, and acquainted with Mr. Marsden. The letter is on business, and it is couched in terms which shew that the subject-matter to which it referred was not of the most pleasant kind. It states the necessity that some agree-

1838.

WRIGHT v. DOE d. TATHAM.

ment should be come to between Mr. Marsden and the parish or township, or disagreeable things would unavoidably happen. Mr. Marton recommends that a case should be settled by the attornies of the respective parties, and laid before counsel, to whose opinion both sides should submit, otherwise much trouble and expense would be occasioned to both parties; and requests that Mr. Marsden would order his attorney to wait on Mr. Atkinson or Mr. Watkinson. It is addressed to Mr. Marsden at Wennington. Mr. James Barrow was at the time the attorney of Mr. Marsden; and in the hand-writing of that gentleman, is indorsed "20th May, 1786, letter from Mr. Marton to Mr. Marsden." Upon what fair ground can it be contended that this letter was not admissible? Mr. Marsden was the person to whom Mr. Marton would address his request; and it is shewn that he did so; and, from the words "I am, Sir, with compliments to Mrs. Cookson," with which he closes his letter, it appears to be clear that it was intended to be delivered to Mr. Marsden personally. It is found, with its seal broken, in the book-case of Mr. Marsden, the depository of many other of his letters and papers, and has been dealt with in the way requested and pointed out by the writer. It is placed in the hands of Mr. Marsden's attorney, and it is marked by him as a man of business would authenticate any document which had been acted upon by him in the matter to which it referred.

Letter of 1799— from the Rev. H. Ellershaw to the testator.

Then, the last letter is that of the Rev. Henry Ellershaw, of the 3rd of October, 1799. The writer had been the curate of the chapelry of Hornby for several years; he had been appointed by Mr. Marsden; and by the letter in question he resigned the preferment in terms of respect, affection, and gratitude, into the hands of his patron. I will not call in aid as a proof of the truth of the contents, as to the competency of Mr. Marsden, the sacred character of the writer, and the reverend person who was present at

1838.

WRIGHT v. DOE d. TATHAM.

the time the letter was written; nor will I attempt to rely upon the improbability, I might say impossibility, of the one having used and the other having sanctioned the use of the terms to Mr. Marsden contained in this letter, if there had been any ground for supposing that he was at the time the weak and incompetent person it was sought by the lessor of the plaintiff to shew him to have been, although such considerations were upon the hearing of this matter on a former occasion elaborately urged and forcibly relied on by one of my learned Brothers, for whose knowledge, derived from a long experience, I entertain the highest respect. I have abstained from so doing, because it appeared to me that this case could be brought within the strict rule which I prescribed to myself for my guidance in forming my judgment upon this question, and to avoid any doubt that might be raised upon the supposed difference that is said to exist between the rule of evidence upon inquiries of this nature in the Ecclesiastical courts and those of the common law.

It is contended that no answer is shewn to have been sent by Mr. Marsden to this letter; and, although I admit such appears to have been the case, I rely upon bringing it within the rule by the acts of Mr. Marsden respecting it. The evidence applicable to it is that which I have before relied on as common to the three, and in addition to it is the material fact of the resignation of the preferment by Mr. Ellershaw.

Upon the whole, from the fullest consideration I have been able to give to this question, I have, my lords, arrived at the conclusion that the three letters were received by Marsden, and so dealt with by him as to bring them within the rule by which their admissibility is to be tried; and my judgment therefore is, that they were evidence upon the issue raised between the parties in the action, and ought not to have been rejected.

1838.

WRIGHT d. DOE d. TATHAM.

None of the letters admissible.

PARKE, B.—I do not think it necessary to trouble your lordships by repeating at length the reasons which I gave in the court below for the opinion that none of the three letters are admissible in evidence. As the printed cases contain copies of the judgments delivered in the Exchequer Chamber, and I do not find any reason for varying or qualifying the opinion I expressed, I will therefore state very concisely the grounds upon which I conclude that the three letters were properly rejected.

These letters are sufficiently proved to have been written and sent to the house of the deceased by persons now dead, and they indicate the opinion of the writers that the alleged testator was a rational person, and capable of doing acts of ordinary business. But it is perfectly clear that in this case an opinion not given upon oath in a judicial inquiry between the parties is no evidence; for, the question is, not what the capacity of the testator was reputed to be, but what it really was in point of fact; and though the opinion of a witness upon oath as to that fact might be asked, it would be only a compendious mode of ascertaining the result of the actual observation of the witness, from acts done, as to the habits and demeanour of the deceased. Nor is the evidence the more admissible because the persons writing the letters do not merely express an opinion in writing, but prove their belief of it by acting upon it to the extent of sending the letters and putting them in the course of reaching the person addressed. After all, it is but an expression of an opinion vouched by an act, and by an act not so strong by any means as others done to third persons which are allowed on all hands to be inadmissible; not even so strong nor so confirmatory of the truth of the communication as a simple letter written to another man. If the opinion of a person be of itself inadmissible, the act which only proves the belief of that person in its truth, and is irrelevant to the issue, except for that purpose, cannot render it admissible.

1838.

WRIGHT v. DOE d. TATHAM.

Besides that, there is another ground, and the only other ground on which these letters are argued to be receivable in evidence, and that is, that there was proof in this case of acts done by the testator in reference to these letters, or at least one of them, which render the contents admissible by way of explanation of those acts. Those acts are, the opening of two of the letters, and placing them in the supposed usual repository of the papers of the deceased, and the opening of the third one, and transmitting it to the attorney, Mr. Barrow.

The answer to this argument is, that there is no direct proof whatever of these acts being done by the testator; and, as to indirect proof, to infer that the testator did the acts, is to assume the very fact to be proved. All these letters are on the same footing, though the objection to the admissibility of the last is, at first sight, not so apparent. If there were a specific issue, or it became material in any issue as to the property of the deceased, in his lifetime, or after his death, to inquire whether he opened the letters addressed to him, and communicated one to Mr. Barrow, it would be inferred that Mr. Marsden did so. But why would it be so inferred? Because, in any inquiry not upon the subject of competency, it would be presumed that he was capable of these acts of business; and upon that ground only. But here the only question is, whether he was capable of doing these acts. For the purpose of shewing his capacity to make a will, the evidence is offered; and, to prove that, a letter found in the repository in an open state, with the indorsement of Mr. Barrow upon it, is produced to shew that the testator was competent to open the letter and to read it over and to refer it to his attorney. If it be asked to use all this as indirect evidence, that is, as an inference that he did the acts, how can I so use it, except upon the ground, that, if he was capable of such acts of business, it is to be presumed that he and not some one else did this? But that is to assume

1838.

WRIGHT v. DOE d. TATHAM.

the degree of competence which the facts are adduced in order to prove. The argument, then, proceeds in a circle—because he had sufficient ability to do these acts of ordinary business, therefore it is to be inferred that he did them; and, because he did them, it is to be also inferred that he was of sufficient ability to do these acts of ordinary business. No such inference can be made without an assumption of the very fact in question. It is said that the other facts which are stated in the bill of exceptions are sufficient to raise an inference of competence, and therefore to prove that the testator did the acts of opening and depositing the two letters, and of transmitting the third to Mr. Barrow: but that is a fallacy, because the question as to the admissibility of the evidence, is, whether these particular facts *do of themselves* conduce to prove competence, for, in no other way are they receivable in evidence. Upon the whole, and under these circumstances, I am therefore of opinion that all the three letters were properly rejected.

Ellershaw's letter alone admissible.

VAUGHAN, J.—The question proposed for the consideration of the Judges is, whether the three letters stated in the bill of exceptions, or either of them, were properly rejected by the learned judge upon the trial of the cause as inadmissible in evidence.

In approaching the discussion of this subject after every argument has been exhausted, both at the bar of the House and by my learned Brothers who have preceded me, which talents or research could supply, and where so little of authority has been found to guide our steps, I should be without excuse if I trespassed at any unreasonable length upon your lordships' time.

The question for the determination of the jury was, whether the testator, John Marsden, from his attaining to competent age in the year 1779, was, down to and at the time of making his will and codicil respectively in the

1838.

WRIGHT v. DOE d. TATHAM.

years 1822 and 1825, of sound mind, memory, and understanding, and capable of executing a will. So large and comprehensive an issue, embracing a period of not less than forty-six years of the testator's life, made all that he said, all that he wrote, and every act he did, relevant and pertinent to the proof of it.

As mere opinions of the writers, the letters no evidence.

Now, it appears not to be disputed that the letters which are the subject of the present inquiry, considered merely as the *expressed opinions* of the several writers, are inadmissible in evidence. They are not sanctioned by the solemnity of an oath. They are not subjected to the test of cross-examination. And they lie not within the boundary of the great rule of evidence, which requires the presence of both these circumstances. Considered, therefore, as *independent evidence* in the character of *expressed opinions*, they are liable to all the objections to which hearsay evidence is exposed. But we are called upon to give them greater weight in the character of *acts superadded to opinions*, or, as it is expressed by counsel, *as treatment* of the testator by those who knew him. Now, the term *treatment*, as properly and commonly applied, intends no more than the conduct of one man to another. A more complex notion is involved in it, when used in its loosest sense; it then conveys the idea of *the acts and conduct of one party, leading to and met by the acts and conduct of another.* If the word treatment, as it is insisted on in the discussion, is intended merely to convey the idea of acts performed by those who wrote the letters, expressive of their opinions, the argument in favour of their admissibility has not, I conceive, based itself upon firmer ground. Acts performed by *strangers*, expressive not merely of opinion, but of the strongest conviction, even in cases where such conviction conflicts altogether with the interest of the person entertaining it: even such acts as these the law will not allow to be presented to the minds of jurymen as evidence. They are merely opinions expressed in different

As acts of treatment of the testator, equally inadmissible.

1838.

WRIGHT v. DOE d. TATHAM.

language, in the language of *conduct*, instead of the language of *words*. They may be acts involving a great sacrifice of personal interest, as, the payment of a policy of insurance by an underwriter on a marine loss; and therefore, as *moral* evidence, they may be very cogent. Yet does the law, more rigid and inflexible, resist the weight of such moral evidence, although, in the ordinary transactions of life, common sense and experience might possibly yield to it. *As acts of strangers*, the law regards them as *personal admissions*, which cannot affect third parties; as *the opinions* of strangers, they bear the general insufficiency and infirmity of hearsay evidence, without any claim to the privilege which in some peculiar subjects of inquiry is extended to that class of proof. Thus, conceding in favour of the argument what is most questionable, viz. that a letter written and sent implies an act performed, as distinguished from a declaration made, yet still does it seem clear that the acts of a person, however pregnant with opinion, cannot be offered in evidence as proof of the truth of that opinion, where the issue lies between other parties. Such seem the legal consequences if we interpret the word *treatment*, as insisted upon in the argument, according to its strict signification, "*as the conduct of one person to another.*"

The case, I think, is not assisted by such a view of the matter; and therefore we are forced into contact with the other meaning with which it may be invested, as implying *the conduct of one person to another, leading to and met by certain acts and conduct on the part of such other person.* And it must be confessed, that, if any acts on the part of the testator, can be proved, either by letter, or from other sources, all declarations and writings which tend to explain such acts may be put in evidence.

Principle upon which their admissibility rested.

The principle, then, upon which alone the letters can claim admission, is the following, *that, where any facts are proper evidence upon an issue, all oral or written declara-*

1838.

WRIGHT v. DOE d. TATHAM.

tions which can explain such facts may be received in evidence. I have stated it thus, because I conceive that the decision of the present question must rest upon this principle. The rule cannot be adequately satisfied, nor its meaning fulfilled, unless we are convinced of the presence of two conditions—first, that there were acts done which would constitute good primary evidence—secondly, that the oral or written declarations throw light upon and explain such acts.

Then, in the first place, it may be asked, is there any evidence of acts done by the testator upon the letters in question, or any one of them (for any acts of the testator are of course evidence). I am of opinion that there is fair ground for such inference. Certain letters are found in a man's private room, in the cupboard of his book-case, with the seals broken, in company with other letters, some of which have indorsements in his hand-writing, and others of which have been answered in his hand-writing. Do not all these facts conspire to prove, at least almost irresistibly to invite the conclusion, *that the letters in question had their seals so broken and were perused by him.* It has been argued at the bar, that, to raise this presumption, we assume the man's competency, which is the point to be proved. A little reflection will, I think, shew this reasoning to be vicious. In the first place, the argument does not *assume* any competency at all; and, in the second place, the competency which is *inferred* is not the competency which is disputed, namely, the *competency to make a will.* First—we do not *assume* any competency, we *infer* it, and for that very reason we do not *assume* it, because we *infer* it: for, nothing is to be assumed which is not taken for granted without any proof; and nothing is inferred which is so taken for granted. And I *infer* that the testator was *competent* to open the seals and peruse the letters, because the answers and indorsements to the other letters in his hand-writing prove him competent so to do;

1838.

WRIGHT v. DOE d. TATHAM.

and we conclude that he actually did open and peruse these letters, because the fact of finding them opened in his private drawer, and in the company of letters which he must be taken to have opened and perused, furnishes cogent evidence that he opened and perused these. But we do not thereby even *infer* him *competent to make a will.* We conclude him *competent* to open and read a letter; but that is not the point at issue, unless these two competencies are identical: and whoever should contend that they are so, must be prepared either to deny that the answers and indorsements are in the testator's hand-writing, or to admit that the discovery of such answers, taken by itself, proves the testator competent to make a will; for, a man cannot be supposed to answer what he did not peruse.

The opening and perusing a letter are certainly acts, and therefore they stand upon the same footing with all the other acts of a man, and may be properly and primarily admitted. How far they are *valuable* elements in a body of proof, is another question, quite distinct from the present. They are facts admissible in evidence to establish the point at issue; and *therefore they clear the way for the introduction of any oral or written declarations which can explain them, and for none but such as do serve to explain them.* And thus we are carried on to the question, whether the contents of the rejected letters, or any of them, can throw any light upon and explain the acts so established: if they can, then of course they may be admitted; if not, they must be rejected.

Now, it is very essential to bear in mind *what is the fact in evidence* with regard to the three letters generally (for, one of them—that with the indorsement of Barrow upon it—may be considered upon distinct grounds), in the explanation of which the contents are called in aid. The only fact at which we have arrived, is, that of the testator having opened the letters, and probably having cast his eye over the contents. Can we shed any new light upon this

1838.

WRIGHT v. DOE d. TATHAM.

fact by the contents of the letters? I think I am warranted in saying that the contents of a letter cannot tend to clear up, or explain, or give any stamp of character to, any act which does not from its nature import that the party acting apprehended or misapprehended its contents. If, for instance, a person has answered a letter, the contents of the first letter reflect a strong light upon the second. The party writing the answer must have had, or believed himself to have had, the contents of the first letter in his mind. So, if it can be shewn that a man has done any act in consequence of having read a letter, that letter will be a very valuable instrument to lead the mind to a proper estimate of the purpose or wisdom of such act. In all these cases, there is some act flowing from an apprehension or a misapprehension of the contents of the letter; and the contents are necessary to enable us to form a judgment of the soundness or absurdity of such apprehension. Or, if a person is proved by gestures or words to have shewn certain signs of passion or apathy upon reading a letter or hearing some intelligence, then those gestures or words, or that apparent disregard, will prove how he apprehended such contents; and such contents may therefore be received to lead us to an opinion of his temper or his sanity. But, in such cases, it is not the perusal of the letter, but the acts and conduct at the perusal, which are illustrated by the subject matter of the letter; and there must be evidence of some such acts or states of mind in order to justify the admission of such declarations. In some cases, indeed, the mere omission to do any thing upon the receipt of intelligence, might be proof of a state of mind. In the present case, then, there is no fact presented to us but that of mere perusal and casting the eye over the contents. There is nothing, as applied to two of the letters, on which we can fairly found the presumption that Mr. Marsden acted as upon an apprehension of what they contained.

1838.

WRIGHT v. DOE d. TATHAM.

From any thing before us, we cannot conclude that he understood them, or that he misunderstood them. There is evidence that he opened them; but, were we, in the absence of independent evidence, *to assume that he understood them*, we should be perhaps assuming the question of his sanity: for, they might contain a discussion on some newly invented machinery, on a question of political economy, or some problems in education generally. Were we to assume that he did not understand, we should be running into the contrary extreme. I am of opinion, therefore, that, with respect to two of the letters, although there is proof of acts performed upon them by the testator, yet they are not such acts as can in any degree be illustrated or explained by the contents of the letters themselves: and consequently that such letters are not admissible.

Oct. 3, 1799—letter from the Rev. Henry Ellershaw to the testator.

There is one letter, however, that with the indorsement of Barrow upon it, produced under different circumstances, and on which I think it may be inferred that acts of a different character have been performed. It is found in company with the others, attended therefore by the same circumstances in general, but also bearing an indorsement in the hand-writing of the testator's *attorney*. Now, it is evident from such indorsement that it was placed *by some one* into the hands of this third person. The same presumption is, of course, raised upon this letter as upon the other two, viz., that it was opened and perused by the testator; and, beyond this, we have the fact, clearly ascertained, that it was put into the hands of a third person. Is not, then, the conclusion forced upon us, that it was the testator who performed this act upon the letter? and, if so, is it not in all respects such an act as the contents of the letter are calculated to throw light upon? It is very different from mere perusal. It is an act performed in consequence of perusal, and it necessarily implies that the testator understood its contents to be of such a nature that it would be *discreet* and *proper* so to deal with it. By pre-

1838.

WRIGHT v. DOE d. TATHAM.

senting such a letter to the intelligence of a jury, we enable them to form a judgment whether such dealing with such a letter were really discreet and proper; and so far they are assisted to an estimate of the testator's state of mind. They cannot pronounce upon the rationality of the act performed, until light is thrown upon it by the letter in question; and therefore *such letter*, falling within the principle of *a written declaration calculated to explain a fact which is proper evidence in the cause*, was, I conceive, admissible, and therefore improperly rejected.

LITTLEDALE, J.—The first question that arises upon these three letters, is, whether they were found under such circumstances as that their being receivable in evidence can be at all inquired into. They were found in a cupboard under a book-case in Mr. Marden's private room; a place wherein many other letters addressed to Mr. Marsden were found, some of which were indorsed by him, and to some others of which letters in answer had been written by Mr. Marsden. The place of custody in itself seems a reasonable and probable place where such letters might be deposited; more cannot be required: the time when they were found is not precisely ascertained; nor could it in my opinion be reasonably expected to have been ascertained with more precision: and therefore I think the custody and time of finding sufficient to let in the further evidence.

Taking the letters collectively, without reference to the particular circumstances of each, it is found they are written by friends of his, addressed to him, containing expressions towards him by the persons who wrote to him which might be expected and ordinarily looked for between one person in a similar situation and station of life, and another, upon the various subjects of commonplace information and business, and of good feeling and gratitude; subjects varied in themselves; and on each of

1838.

WRIGHT v. DOE d. TATHAM.

these the writer expresses himself in such manner as one man would naturally express himself to another.

The rationality of the writer is admitted; that of the person addressed is the matter in dispute: and the question is, whether these letters are admissible in evidence for the purpose of investigating that point. Now, the opinion of the writer, as far as the mere letters go, is in favour of the person addressed being rational and competent to understand them. The letters also bespeak a great private acquaintance with Mr. Marsden. There is, therefore, I assume, upon the whole, an expression of the opinion of the writers who appear by the letters to have competent means of judging of the ability of Mr. Marsden to understand them. Suppose the writer had addressed a letter, as nearly similar as the circumstances would admit, to a third person; or suppose he had met Mr. Marsden in company, or in the street, and had addressed the same language to him, and there had been no answer from Mr. Marsden; or had addressed the same observations to another person: every one of these cases which I have just put would have amounted to an expression of an opinion. But would it have amounted to any thing but mere opinion? It is not upon oath. If a party were alive and could be cross-examined, he could be examined as to the ground of his belief of the competency. But letters of this sort are much less likely to express the real sentiments of the writer than if written to a third person, as it is not likely that the writer would in letters to the party himself indicate any thing tending to a doubt of his capacity.

As an act done.

It is said to be *an act done*; and there are many cases where an act done may have more effect than a verbal declaration; but, to have that effect, it must be something done towards a matter of business in progress or contemplation. But, here, the only act done, is, writing a letter, containing nothing more than an expression by word of

1838.

WRIGHT v. DOE d. TATHAM.

mouth would do, which does not fall within the usual meaning of acts done, which are sometimes made evidence when done even by third persons.

As evidence of treatment.

But then it said to be evidence of treatment by the writer of the letter. It does not appear to me at all within the meaning of the expression *treatment*. By treatment, I should understand to be meant the manner in which, when two persons are living in society, one conducts himself towards another in some way, so that the conduct of both parties is to be considered, and which may be shewn by common instances of intercourse, or by mutual correspondence, or by letters, in which, though there be no mutual correspondence, one person has so conducted himself, either well or ill, as to draw forth from another a letter expressive of approbation or disapprobation of the writer, as the case may be; but, if it be a single letter addressed by one person to another, and the question is as to the competency of understanding of the party addressed, I cannot consider it in the light of *treatment:* it comes to nothing but opinion. In that point of view, in the absence of the power of cross-examination, the mere opinion of the party goes for nothing, and the only thing to be attended to, is, the manner in which the thing done is acted upon by the party to whom either the letter or the language is addressed.

Numerous illustrations of this have been given, which it is not necessary to take into consideration. But, on a question of competence, where the party who alleges the competency is bound to prove it, he must shew that the person has done some act upon this manifestation of opinion, which indicates that he understands the manifestation; if he does so, it is admissible in evidence, and the effect of it will be left to the jury. But, unless it be proved that he has done something upon this manifestation in the conduct of other persons shewn by letters or conversation or other things, to evince that he had a competent

1838.

WRIGHT v. DOE d. TATHAM.

mind to understand the effect of them, then these opinions or manifestations go for nothing, and cannot be submitted for the consideration of a jury.

It is said, that, in cases of crim. con., letters found in the possession of the parties have been admitted in evidence. That is not a case of competence, but to shew on what terms the parties lived. So also, in other cases, letters found in the possession of persons are admitted: but there also the competence is not in doubt, but the question is whether the letters shew that the parties are concerned in the transaction which is the subject of the inquiry. But, where the inquiry is, whether the person be competent or not, you cannot infer his competency from the possession of letters, till you hear that he has in some way acted upon them; because you would then begin by assuming his competency, in order to prove the very fact in issue.

As to the rule in the Ecclesiastical courts.

It has been urged that it is the practice of the Ecclesiastical courts to admit letters similarly circumstanced, to prove the competency of persons to make a will. Supposing the practice to be well established, and to be shewn to have existed a considerable time, I should not think we are therefore to adopt their rule in the courts of common law. They have a different mode of proceeding in those courts.

Mere opening of letters not sufficient to make them evidence.

It may be said that the mere opening of the letters is sufficient evidence of competency to let them in as evidence. I think not; for, assuming them to have been opened by Mr. Marsden himself, that is not sufficient to shew that he understood them. And, again, it may be said, that, as a great many letters have shewn that Mr. Marsden acted upon, by indorsing them, and that as to other letters he had sent answers, it was to be presumed that he understood these letters also: but I think not; I think every letter must speak for itself. It may be said, that, if there were twenty letters which Mr. Marsden had acted

1838.

WRIGHT v. DOE d. TATHAM.

upon, and only one in the predicament of these three letters; it should be presumed that he had acted upon that one; but, suppose on the other hand, there was only one which he had acted upon, and twenty in the predicament of these three; should it be inferred that he had acted upon the twenty? I think each letter must be considered singly.

After stating so much of the general nature of evidence as applicable to letters of this description, I shall now examine the particular letters which are the subject of your lordships' question. And, first, as to the letter of Charles Tatham, written in 1784 to Mr. Marsden: that letter is written in a way one relative might be supposed to write to another under similar circumstances, and does not express any sentiments which bespeak any opinion contrary to the competence of Mr. Marsden. No indorsement is made upon that letter by Mr. Marsden; but, in 1787, he writes to Charles Tatham, mentioning the receipt of another letter from Charles Tatham, but making no allusion to the one in question. It has been contended that this letter is admissible as forming part of the correspondence. If I could discover that it did form a part of the correspondence, I should think it admissible, although it was not noticed in Mr. Marsden's letter of 1787; but I cannot see any thing to indicate that it did form part of the correspondence; and my opinion is that it ought not to have been admitted in evidence. Next, as to the letter of Mr. Ellershaw—it is one of great feeling and gratitude, and very proper to be written on the occasion; but there is no evidence of Mr. Marsden having acted upon or recognised it; and that also, I think, should not have been received in evidence. As to the letter of Oliver Marton, that is not indorsed by Mr. Marsdon himself, but it is so by Mr. Barrow, his attorney, and therefore it is evident that Mr. Barrow had acted upon it: that is said to be no evidence that Mr. Marsden

Letter from C. Tatham—Oct. 12, 1784,—not receivable.

Ellershaw's letter—Oct. 3, 1799—not receivable.

Marton's letter—May 20, 1786—receivable.

1838.

WRIGHT v. DOE d. TATHAM.

had authorised him to do so, or ever knew that he did; for, Mr. Barrow may have himself of his own head opened the letter or seen it after it had been opened by Mr. Marsden, and, seeing his name mentioned, or that he was alluded to in it, and that the business proposed was proper to be done, he may have done it, and written his name upon it, which indicates his acting. It is said, that, if you infer that Mr. Marsden opened the letter, and directed Mr. Barrow to do what is mentioned, you infer that Mr. Marsden was of competent mind to do these acts, which is the very thing to be proved; and that therefore, to shew that he is competent, you really infer that he is competent; for, unless you shew that he gave the directions to Barrow, you have no right to assume that he did so. But it does not appear to me, that, by admitting the letter, you do infer his competence. Here is a letter addressed to Mr. Marsden, recommending that his attorney should transact a certain business; Mr. Barrow is his attorney, and you find by Mr. Barrow's indorsement, that he had attended to the directions of the letter: the very thing therefore is done which was recommended by Mr. Marton, to Mr. Marsden. Suppose Mr. Atkinson or Mr. Watkinson had been alive, and had been called to prove that he and Mr. Barrow had a negotiation on the subject of the letter; and the evidence had stopped there, and nothing had been proved as to Mr. Marsden's knowledge or assent to what had been done; it might still be said to be no evidence: but, however slight the effect of the evidence, I think, as the thing was acted upon which was recommended to Mr. Marsden, that this letter ought to have been received in evidence.

PARK, J.—I do assure your lordships, it always gives me great pain to differ from my learned Brothers in point of law, especially when the number differing from me is so great; under such circumstances, I cannot but be greatly

1838.

WRIGHT v. DOE d. TATHAM.

diffident in the opinion I have formed. My dislike to differing in opinion is founded upon the principle which has pervaded my judicial conduct during the long period of twenty-two years. I am of opinion that it is essential to the due administration of justice, and to the general benefit of the subject, that there should be a strong desire to be unanimous, if possible, on all occasions, but more particularly upon points of essential moment to the interests of substantial justice. Unfortunately this case involves an important point of evidence, and therefore I feel myself reluctantly obliged to declare my dissent from the opinions of so many of my Brothers who have addressed your lordships. In expressing my reasons for that dissent, I shall endeavour to be extremely short, and confine myself to the rejection of the letters: for, the question propounded to her majesty's judges, after stating all the facts necessary to raise the question, is this, whether the three letters mentioned in the case, or any of them, be admissible in evidence on behalf of the defendant below.

All the letters admissible.

To that question my answer is in the affirmative. First, let us see in what place these letters were found. It is stated, that, after Mr. Marsden died, many letters addressed to him by various persons were found with other papers in a cupboard under his book-case, in his private room; that to many of these letters answers in the handwriting of and signed by Mr. Marsden were found; that on some were his indorsements; and such letters were read: but that, as to the three letters in question, they stand on a different footing, for, upon none of the three is, I admit, the hand-writing of the testator himself to be found. They were, however, found in the same cupboard, and it is only upon the question of place I am now treating. It was a fit place, in a gentleman's own private room, where he was wont to be, in which to deposit letters or other papers that he received and thought proper to preserve. It was asked in argument, "How do you know that Mr. Marsden depo-

sited all the letters?" That is a fair observation, and fit for the consideration of a jury, but in my opinion no ground for rejection. I think the papers which were found in the same place furnish presumptive evidence that they were placed there by the testator, there being no fraud stated or insinuated, nor any proof that other persons were in the habit of frequenting that room: indeed, the length of time since those letters were dated, seems to exclude all suspicion of fraud; for, no question had then arisen, nor for many years afterwards. It is supposed that the fact of Mr. Marsden having indorsed *some* of the letters is a decisive reason for saying that he never opened the letters in question. I must say, with all deference to those who thus argue, that this is reasoning against the usual practice and habits of mankind, and against every man's personal experience, unless we suppose, that, in order to shew that it has been read by him to whom it is addressed, every letter received must be indorsed. I am willing to admit, that, if there had been only a few letters found in the place where these letters were found, and of recent date, and that the inquiry as to sanity embraced only a few of this gentleman's latter years, perhaps I should have wavered in my opinion: but the lessor of the plaintiff having chosen to throw the charge of mental incapacity over the whole of Mr. Marsden's life, almost à nativitate, I think this opens so wide a field for investigation that it gives those who contend for the production in evidence of those letters of ancient date a right to shew how he was at that time treated by relations, friends, and neighbours: and, if the foundation be thus shaken, by shewing that he was considered as sane thirty or forty years ago, it tends to weaken the evidence of those who say that he was always an incapable man. If letters had been found in this depository, addressed to him by literary and scientific men, with no doubt of their authenticity, consulting him upon some point of science or literature, I cannot bring myself to think that

1838.

WRIGHT v. DOE d. TATHAM.

such letters (always guarding myself against fraud) would not be good evidence to prove sanity: what effect they might have upon the mind of a jury is another question. I almost think it was not worth while to insist upon the admissibility of the letters in question, or to insist, on the other hand, upon their rejection; but here unfortunately we are obliged to discuss it. I admit the rule, and fully adopt it, as laid down by the court of King's Bench in this case, that it ought to appear that some act (that court admitting that the least act done would be sufficient) was done by the testator with reference to the letters, to make them evidence: for, such act could not be explained without reference to them, and, if received, no rule of law could prevent their being submitted for the consideration of a jury. I insist, according to that proposition, that some act was done by him as to the three letters in question, but most clearly as to one of them.

General observations.

Let us first see who the writers were—one, a cousin, in a distant part of the globe—another, a respectable clergyman whose ministrations Mr. Marsden attended—and the third, another respectable clergyman resident at Lancaster, writing to Mr. Marsden on secular business, but shewing by his mode of addressing him that he treated him with familiarity and affection. The time when these letters were written—one in 1784, another in 1786, and the third in 1799—precludes all idea of a view to a question which did not arise till above forty years after they were written. "It seems to follow," says Mr. Starkie, "that all the surrounding facts of a transaction, or, as they are usually termed, the res gestæ, may be submitted to a jury, provided they can be established by competent means, and afford any fair presumption as to the question in dispute; for, so frequent is the failure of evidence from accident or design, and so great is the temptation to conceal the truth and misrepresent facts, that no competent means of ascertaining the truth, can or ought to be neglected,

the degree of competence which the facts are adduced in order to prove. The argument, then, proceeds in a circle—because he had sufficient ability to do these acts of ordinary business, therefore it is to be inferred that he did them; and, because he did them, it is to be also inferred that he was of sufficient ability to do these acts of ordinary business. No such inference can be made without an assumption of the very fact in question. It is said that the other facts which are stated in the bill of exceptions are sufficient to raise an inference of competence, and therefore to prove that the testator did the acts of opening and depositing the two letters, and of transmitting the third to Mr. Barrow: but that is a fallacy, because the question as to the admissibility of the evidence, is, whether these particular facts *do of themselves* conduce to prove competence, for, in no other way are they receivable in evidence. Upon the whole, and under these circumstances, I am therefore of opinion that all the three letters were properly rejected.

O. Marton's letter alone admissible.

VAUGHAN, J.—The question proposed for the consideration of the judges is, whether the three letters stated in the bill of exceptions, or either of them, were properly rejected by the learned judge upon the trial of the cause as inadmissible in evidence.

In approaching the discussion of this subject after every argument has been exhausted, both at the bar of the House and by my learned Brothers who have preceded me, which talents or research could supply, and where so little of authority has been found to guide our steps, I should be without excuse if I trespassed at any unreasonable length upon your lordships' time.

The question for the determination of the jury was, whether the testator, John Marsden, from his attaining to competent age in the year 1779, was, down to and at the time of making his will and codicil respectively in the

1838.

WRIGHT v. DOE d. TATHAM.

years 1822 and 1825, of sound mind, memory, and understanding, and capable of executing a will. So large and comprehensive an issue, embracing a period of not less than forty-six years of the testator's life, made all that he said, all that he wrote, and every act he did, relevant and pertinent to the proof of it.

As mere opinions of the writers, the letters no evidence.

Now, it appears not to be disputed that the letters which are the subject of the present inquiry, considered merely as the *expressed opinions* of the several writers, are inadmissible in evidence. They are not sanctioned by the solemnity of an oath. They are not subjected to the test of cross-examination. And they lie not within the boundary of the great rule of evidence, which requires the presence of both these circumstances. Considered, therefore, as *independent evidence* in the character of *expressed opinions*, they are liable to all the objections to which hearsay evidence is exposed. But we are called upon to give them greater weight in the character of *acts superadded to opinions*, or, as it is expressed by counsel, *as treatment* of the testator by those who knew him. Now, the term *treatment*, as properly and commonly applied, intends no more than the conduct of one man to another. A more complex notion is involved in it, when used in its loosest sense; it then conveys the idea of *the acts and conduct of one party, leading to and met by the acts and conduct of another*. If the word treatment, as it is insisted on in the discussion, is intended merely to convey the idea of acts performed by those who wrote the letters, expressive of their opinions, the argument in favour of their admissibility has not, I conceive, based itself upon firmer ground. Acts performed by *strangers*, expressive not merely of opinion, but of the strongest conviction, even in cases where such conviction conflicts altogether with the interest of the person entertaining it: even such acts as these the law will not allow to be presented to the minds of jurymen as evidence. They are merely opinions expressed in different

As acts of treatment of the testator, equally inadmissible.

1838.

WRIGHT v. DOE d. TATHAM.

From any thing before us, we cannot conclude that he understood them, or that he misunderstood them. There is evidence that he opened them; but, were we, in the absence of independent evidence, *to assume that he understood them*, we should be perhaps assuming the question of his sanity: for, they might contain a discussion on some newly invented machinery, on a question of political economy, or some problems in education generally. Were we to assume that he did not understand, we should be running into the contrary extreme. I am of opinion, therefore, that, with respect to two of the letters, although there is proof of acts performed upon them by the testator, yet they are not such acts as can in any degree be illustrated or explained by the contents of the letters themselves: and consequently that such letters are not admissible.

May 20, 1786—letter from the Rev. Oliver Marton to the testator.

There is one letter, however, that with the indorsement of Barrow upon it, produced under different circumstances, and on which I think it may be inferred that acts of a different character have been performed. It is found in company with the others, attended therefore by the same circumstances in general, but also bearing an indorsement in the hand-writing of the testator's *attorney*. Now, it is evident from such indorsement that it was placed *by some one* into the hands of this third person. The same presumption is, of course, raised upon this letter as upon the other two, viz., that it was opened and perused by the testator; and, beyond this, we have the fact, clearly ascertained, that it was put into the hands of a third person. Is not, then, the conclusion forced upon us, that it was the testator who performed this act upon the letter? and, if so, is it not in all respects such an act as the contents of the letter are calculated to throw light upon? It is very different from mere perusal. It is an act performed in consequence of perusal, and it necessarily implies that the testator understood its contents to be of such a nature that it would be *discreet* and *proper* so to deal with it. By pre-

1838.

WRIGHT v. DOE d. TATHAM.

senting such a letter to the intelligence of a jury, we enable them to form a judgment whether such dealing with such a letter were really discreet and proper; and so far they are assisted to an estimate of the testator's state of mind. They cannot pronounce upon the rationality of the act performed, until light is thrown upon it by the letter in question; and therefore *such letter*, falling within the principle of *a written declaration calculated to explain a fact which is proper evidence in the cause*, was, I conceive, admissible, and therefore improperly rejected.

LITTLEDALE, J.—The first question that arises upon these three letters, is, whether they were found under such circumstances as that their being receivable in evidence can be at all inquired into. They were found in a cupboard under a book-case in Mr. Marsden's private room; a place wherein many other letters addressed to Mr. Marsden were found, some of which were indorsed by him, and to some others of which letters in answer had been written by Mr. Marsden. The place of custody in itself seems a reasonable and probable place where such letters might be deposited; more cannot be required: the time when they were found is not precisely ascertained; nor could it in my opinion be reasonably expected to have been ascertained with more precision: and therefore I think the custody and time of finding sufficient to let in the further evidence.

Taking the letters collectively, without reference to the particular circumstances of each, it is found they are written by friends of his, addressed to him, containing expressions towards him by the persons who wrote to him which might be expected and ordinarily looked for between one person in a similar situation and station of life, and another, upon the various subjects of common-place information and business, and of good feeling and gratitude; subjects varied in themselves; and on each of

1838.

WRIGHT v. DOE d. TATHAM.

by which an individual would be governed, and upon which he would act with a view to his own concerns in ordinary life." Taking this rule laid down in Mr. Starkie's excellent book to be a sensible and well considered rule, I beg your lordships to take under your view whether competent means have not been rejected tending to shew the opinions of those respectable persons by whom Mr. Marsden was addressed, and who treated him as a sane, and, though not a bright person, yet as a man competent to all the ordinary concerns of life. It seems to me impossible to suppose that persons of character and intelligence, who were well acquainted with him, wrote to an incompetent person such letters as they would not have addressed to any but a person whom they supposed to be of sound mind; and this covering the long period in which he is said to have been unfit to associate with such men as his situation in life entitled him to associate with. Independently of the contents of the letters themselves, which I shall presently comment upon, the length of time during which they have existed, proves to me that Mr. Marsden opened and put them safely away. If he had been a weak and silly idiot, he might perhaps have broken the seals and thrown the letters down, and they would have been taken away as waste paper by the domestics; but the seals are broken and the letters are carefully put away by Mr. Marsden himself, and not destroyed.

Oct. 12, 1784—letter from C. Tatham to the testator.

The first important letter is the one written in the year 1784, by a cousin then in America, to the testator; the writer begins and concludes it with terms of great endearment and affection; he gives a history of his voyage, the state of the country in point of halth when he arrived at Alexandria, and alludes in general terms to his future prospects: in short, if the man to whom this letter was written was known by the writer to be an idiot from the earliest period, the writer must be a greater idiot than the receiver of it. But it is said there is no proof that Mr.

1838.

WRIGHT v. DOE d. TATHAM.

Marsden did any thing with this letter. It was marked as a ship-letter, with the London post-mark upon it; it was found open, and in Mr. Marsden's depositary. Why we are to suppose that the letter found open in a man's desk or cupboard, and written nearly fifty years ante litem motam, had neither been opened or read by himself, on account of idiotcy, I own, as the late Lord Ellenborough once said, I have not optics to discover; and at a time, too, when the litigating party, who is most blamed now, was then probably too young to have been a member of Mr. Marsden's family.

As to the draft letter of 1787.

The bill of exceptions then states, that, amongst a vast variety, in the same place, was found a draft of a letter in the hand-writing of the testator, addressed to this cousin, which, though not an answer to the letter I have just commented upon, shews that a correspondence was going on between these relations; for, the letter of which this is a draft proves that the testator had received another letter from Charles Tatham in the intermediate time: "You mentioned in your letter" (which must necessarily mean a subsequent letter to that of 1784, for, nothing is stated in that letter of the things mentioned by Mr. Marsden in this draft) "that you have sent me a small quantity of dried fruit: I received nothing but the map, for which I thank you. My aunt has had very poor health since you left England; she has scarcely ever been well. I am in hopes she is getting better again; I think that change of air and a journey would be of service to her. We have lately had an account of poor Mrs. Smith's death; she died at St. Alban's, the 7th instant. My aunt has had a letter from your brother Harry; he is very well. It is reported that your acquaintance Mr. Bradshaw is going to be married to a Miss Fell, of Lancaster; whether there is any truth in it or not, I cannot tell. I suppose you have received my last letter" (therefore he had written before), "wherein you will see an account of your nurse's

death." Now, here is a letter which could only be written by a man of some intelligence, and containing a number of occurrences, which, though of no moment to a stranger, he judiciously felt would be interesting to a relation on the other side of the Atlantic, removed from his family and friends.

Ellershaw's letter of 1799.

The next letter I shall mention, though the last in point of date, written thirty-nine years ago, namely, in 1799, is that from Mr. Ellershaw. I know not, my lords, what other men feel: but, speaking for myself, I should say that a person of the sacred function writing such a letter as I am about to read to your lordships, to one who was, as the case supposes, a manifest idiot, expressive of such sentiments as to Mr. Marsden's piety, beneficence, and hospitality, must be a knave or a hypocrite, and a disgrace to his holy calling, if he thought him incapable of managing his own worldly affairs; and this too at a time when Mr. Ellershaw was about to quit his charge near the testator, and could have no secular motive to induce him to act the hyprocite, even if not restrained by higher motives. [The learned judge read the letter.]

Marton's letter of 1786.

Now we are arrived at Mr. Marton's letter; and, upon every priniciple laid down by some of the judges, and recognised by the judges of the Queen's Bench, I cannot conceive how it could be rejected. The letter bears date fifty-two years ago, namely, 1786. Mr. Marton was a man of large fortune, and the vicar of Lancaster, where he lived, nine miles from Wennington, where Mr. Marsden then resided; and, from what I knew of him—and I knew him well—he was the last man to put pen to paper upon business to one whom he must have known, if there is any foundation for it, to be an idiot. It begins "Dear Sir," shewing an intimacy; and it concludes with requesting an answer—an answer, my lords, from a person said to be totally unfit to manage his affairs. Mr. Marton must have been as mad as Mr. Marsden.

1838.

WRIGHT v. DOE d. TATHAM.

As to the place of deposit.

Well, then, where is this letter found? In the same repositary, open: and, more than this, the letter is dated 20th May. Mr. Marsden is addressed as then living at Wennington Hall, about ten or eleven miles from Lancaster; he must have received it on the very day it was written, and he must have read it; for, it desires him to order his attorney to do so and so; that attorney, Mr. James Barrow, afterwards a barrister, residing in Lancaster; and we find his (Barrow's) indorsement upon it —"20th May, 1786, letter from Mr. Marton to Mr. Marsden." It appears that Mr. Marsden immediately complied with Mr. Marton's desire; for, on that very day it was written at and sent from Lancaster, we find it back again in the hands of Mr. Barrow at Lancaster, no doubt to do the needful upon it; and that letter is found in the repositary of the testator. Why is it to be suspected that some person at that distant period—above half a century from this time—opened that letter and sent it to Mr. Barrow, unknown to Mr. Marsden, and afterwards put it amongst his papers to furnish evidence to support a will half a century afterwards, and which will did not exist till nearly forty years after the writing of Mr. Marton's letter? If, then, this be too absurd a supposition, surely here is recognition sufficient to satisfy the requisition of the court of Queen's Bench. Much of the argument against the propriety of admitting these letters has turned upon a variety of conjectures and suppositions wholly unfounded, imputing fraud to persons who were hardly in existence at the time when those letters were written. I cannot gain sufficient information about the practice of the Ecclesiastical courts of this country, to warrant me in drawing the decisions of those courts in aid; but my opinion, which I submit with all diffidence to your lordships, differing as I do from so many of my learned Brothers, I have declared upon my conception of the rules of our own law in a case where no allegation of

fraud appears. I am, therefore, bound to state to your lordships my opinion that these letters should have been received in evidence; and therefore that the judgment of the court below was erroneous.

TINDAL C. J.—The question proposed by your lordships for the opinion of her majesty's judges has been so fully discussed by my learned brethren who have preceded me, that I shall endeavour to compress within as small a compass as is inconsistent with perspicuity, the reasons for the opinion at which I have arrived; namely, that, of the three letters embodied in the question put to us, one only, that is, the letter written by Oliver Marton to the testator, was admissible in evidence; and that such letter ought to have been submitted to the jury by the learned judge who tried the cause. I take the rule of law on this subject to have been properly laid down by the court of King's Bench on a former motion for a new trial in this cause, viz. that letters written and sent to the testator, concerning whose competency the inquiry arises, from parties acquainted with him, are not of themselves, and without some act of the testator in respect of such letters, admissible in evidence to prove his competency; but that any the least act done by the testator with reference to the letters produced, would give them admissibility. And I consider the ground upon which such rule is placed by the court to be satisfactory, viz. that such letters amount to no more than treatment of the testator, without any proof of his being conscious of such treatment; or as amounting to no more than a parol conversation with him, which is not shewn to have reached his ear; and thus to indicate no more than the mere opinion of the writer upon the state of mind of the testator; which opinion is inadmissible, upon the double ground, first, that it is not given upon oath, and secondly, that it has not been subjected to the test of cross-examination. But, if it is once shewn

1838.

WRIGHT v. DOE d. TATHAM.

that the letters were *read* by him, so that he could exercise any act of judgment upon their contents, or if it is shewn that he did exercise any act of judgment and reason, as by *answering* them, or by *acting upon* them; in each and every of these cases the letters are admissible in evidence: such evidence varying in its weight upon the subject of inquiry, according to the degree of judgment and capacity which is imported by such acts done; but all such letters being admissible to the jury, who will give the proper degree of weight to the evidence in each particular case. The question, therefore, with respect to the admissibility of the three letters, comes to this—Is there any evidence stated to us from which it can be inferred that the contents of these letters, or any of them, were ever perused by the testator, and by that means submitted to the exercise of his understanding and reasoning powers? or, is there any evidence of his doing any act with reference to them, which may, according to the nature of such act, import the exercise of a larger or smaller extent of reasoning power?

No doubt appears to have existed in the minds of any of the learned judges when the present case came before the court of Exchequer Chamber, as to the propriety of admitting in evidence such letters as appeared to have been opened and to have been *indorsed* in the handwriting of the testator himself: and the only ground upon which such letters could be received, and the three letters now under consideration rejected, must have been, that the indorsing of a letter being an act ordinarily done by the party to whom it is addressed after he has perused it, and necessarily implying that he has made himself so far master of the contents as to have learned from it the name of the writer, or the date of the letter, or both (as the indorsement may purport), there is sufficient evidence to presume that the testator must have read the letter, and so far understood the contents as to be capable of extract-

1838.

WRIGHT v. DOE d. TATHAM.

ing these particulars. But, on neither of the three letters under investigation is there any such indorsement; and the question therefore is, whether there is any other act done with reference to them, or any of them, which is capable of supplying such deficiency, and shewing that the testator exercised any judgment or understanding upon their contents.

As to the letters from Charles Tatham and Ellershaw.

With respect to the letter from Mr. Charles Tatham, under date of the 12th October, 1784, and the letter from the Rev. Henry Ellershaw, under date the 3rd October, 1789, I see no circumstance whatever attending them which indicates any the least act done by the testator respecting them, or any the least proof that he exercised his understanding or judgment upon them. They were never *answered* by him, so that this, the best and most convincing proof of his understanding, is wanting; they were never *indorsed* by him; and, when so many other letters were found in the same repository, both opened and indorsed, and these were not, the absence of this act of recognition makes against their admissibility. These two letters therefore do in my apprehension range themselves within the class of letters proved to have been written to, but not proved to have reached the understanding of, the testator; and upon the ground above stated I think them inadmissible.

Marton's letter receivable.

But the letter from Oliver Marton does, as I conceive, stand upon a very different ground; for, as to that letter, the facts found by the jury shew to my mind, not indeed by direct evidence, but by legal inference from the attending circumstances, that the testator *did act* upon that letter, and exercised some judgment upon it. That the letter reached Mr. Marsden at the time it was written, appears from its address to him at Wennington Hall, where he then resided, and from its having been removed with his other letters to Hornby Castle, where he died, and kept by him at the latter place in the same depository

1838.

WRIGHT v. DOE d. TATHAM.

with his other letters and papers. That it was communicated to Mr. Barrow, his attorney, by *somebody*, appears from the indorsement in the hand-writing of Mr. Barrow; such indorsement of the date of the letter and the names of the writer and the party addressed, being precisely the mode in which a letter upon business would be marked by an attorney in the ordinary course after he had perused its contents. That, after such communication to the attorney, it was returned again to the possession of Mr. Marsden, is the fair inference from its being found there indorsed by Mr. Barrow: and, why should this letter be the only one of all the number which came to the hands of Mr. Barrow, except that it was the only one which appears by its contents was required to come to his hands?

Now, the communication of this letter to Mr. Barrow was just the course which, in the transaction of the business to which the letter related, any party to whom such a letter was addressed would take. The communication of the letter to Mr. Barrow was of itself an intimation to him to see the contents of it performed; that is, to wait on Mr. Atkinson or Mr. Watkinson, to propose terms of agreement, or to settle a case for counsel. If no fraud or confederacy is to be imported into the case, and none can, for none is found by the jury, the inference to be drawn from what does appear, is, that the letter reached Mr. Marsden, that he did what the letter required him to do after reading it, and that it was returned back again by his attorney.

The ground upon which some of my learned Brethren held this letter to be inadmissible, when, upon a former occasion, the case was before the Exchequer Chamber, was this; that, as the present issue is directed to try the competency of mind of the testator, to argue upon his acting under the circumstances supposed as a reasonable man would act, amounts to an assumption of the thing to

1838.

WRIGHT v. DOE d. TATHAM.

be proved. I must confess myself not in any way satisfied with the force of that objection. The proper question is, as it appears to me, whether a given state of circumstances amounts to and supplies the place of direct proof; and that question can never in any case depend upon, or have the least relation to, the form of the issue which is under investigation. If it had been proved by direct evidence, that Mr. Marsden had received the letter and opened it, had sent it to his attorney, and that it had been returned back from the attorney to him, no doubt would have existed as to the admissibility of the letter. The question now to be solved is, whether the circumstances proved are such as would naturally attend upon and accompany the fact of the testator's having acted to that extent upon the letter, so as to afford the fair and reasonable presumption that in fact he did so act.

These facts have their existence and their necessary relation to each other and to the thing which is to be inferred from them, altogether independently of the question with respect to which they are brought forward. The nature of the inquiry therefore ought, as it appears to me, to be kept completely out of view. The strength of the inference depends altogether in every case upon the experience we have, that, in the ordinary course of the business of life, such and such facts are not found to exist without being accompanied by the existence of the fact with respect to which there is no direct proof. But, to import into this calculation the consideration that the inquiry regards a particular subject, is, not to give the ordinary and due weight to the circumstances themselves, but a varying and uncertain effect, dependent on the nature of the inquiry in each particular case; and, consequently, in the case before us, to hold, that, if the inquiry had been of a different nature, the inference from the circumstances proved ought to be such as to establish Mr. Marsden's having acted with respect to this

1838.

WRIGHT v. DOE d. TATHAM.

that none of them should have been admitted (*c*). In this latter opinion I entirely concur. There was no evidence to shew how the letters got into the place where they were found; and this deficiency could only be supplied by an inference that would fall very little short of an assumption of the very fact in issue in the cause—the competency of Mr. Marsden. With respect to the letter of the Rev. O. Marton, Barrow's indorsement on it, though not inconsistent with the fact of the testator's competence, was clearly consistent with his incompetency. The only may in which that letter could be distinguished from the other two, was, by shewing that the testator had done some act with regard to it. No such proof was given.

The judgment of the Exchequer Chamber was thereupon—

Affirmed.

(*c*) Parke, B., Bosanquet, J., Alderson B., Patteson, J., Williams, J., and Coleridge, J.

IN THE COMMON PLEAS.

EASTER TERM, 1 VICTORIÆ.

THE JUDGES WHO SAT IN BANC DURING THIS TERM WERE— TINDAL, C. J., PARK, J., BOSANQUET, J., AND COLTMAN, J.

1838.

Wednesday, April 18th.

DRIFFIN *v.* TAYLOR.

The swearing an affidavit to hold to bail (in trover) before a commissioner of the court, is a "business depending in the court," within the 11 Geo. 4 & 1 Will. 4, c. 70, s. 4, sufficient to authorize any judge of either court to make an order for holding the defendant to bail.

BY the 11 Geo. 4 & 1 Will. 4, c. 70, s. 4, it is enacted that every judge of the courts of King's Bench, Common Pleas, and Exchequer, to whatever court he may belong, shall be, and he is thereby accordingly authorized to sit in London and Middlesex for the trial of issues arising in any of the said courts, and "to transact such business at chambers or elsewhere, *depending in any of the said courts*, as relates to matters of over which the said courts have a common jurisdiction, and as may, according to the course and practice of the court, be transacted by a single judge."

During the last Circuit, Lord Abinger, C. B., the only judge in town, upon an affidavit sworn before a commissioner of this court, in an action of trover brought to recover certain bills of exchange, made an order for holding the defendant to bail. The defendant, having been arrested pursuant to this order upon process issuing out of this court upon the affidavit before mentioned, Park, J.,

1838.

DRIFFIN v. TAYLOR.

made an order for his discharge, that learned judge conceiving that there was nothing *depending* in this court within the meaning of the statute, at the time Lord Abinger's order was made, to give his lordship jurisdiction. The order was granted conditionally—cause to be shewn in court on the first day of term.

Adams, Serjeant, now shewed cause.—The affidavit to hold to bail upon which the application to Lord Abinger was founded, was "business depending in this court" within the meaning of the statute. In *Winter* v. *Payne*, 6 T. R. 645, it was held that charges for "drawing and ingrossing an affidavit of debt in order to hold the party to bail—paid for swearing &c.," were charges for *business done in court* within the statute 2 Geo. 2, c. 23, s. 23: the court saying, "that the charges for making the affidavit and for swearing were for proceedings in the court, as the oath must either be administered by the court itself or by some authority delegated by the court; and that the act of parliament, being beneficial to the subject, ought to receive a liberal construction." By the 3 Geo. 4, c. 102, s. 2, it was enacted (*a*), "that, from and after the passing of that act, it should and might be lawful to and for his majesty, his heirs and successors, and he and they were thereby authorised, from time to time, as to him or them should seem meet, by warrant under his or their sign manual, directed to the judges of the court of King's Bench, to direct and require the judges of the said court, or any two or more of them, to meet at Serjeants' Inn Hall, Westminster Hall, or some other convenient place to be by them appointed, on such and so many days in the vacation or interval between any terms, as to his majesty, his heirs and successors, should seem fit and proper, for the dispatch of such matters as at the end of the term men-

(*a*) This statute is repealed by the 11 Geo. 4 & 1 Will. 4, c. 70, s. 5, except so far as it repeals the 1 & 2 Geo. 4, c. 16, s. 1.

1838.

DRIFFIN v. TAYLOR

tioned in such warrant might be *depending in the said court*, whether on the crown or plea side thereof." In *Ex parte Smith*, 7 D. & R. 382, it was held that an affidavit (*b*) sworn during term was sufficient to bring the subject matter before the court as a "matter depending in the court," within the terms of the above act and the king's warrant founded thereon: and the court said—"The act, and the jurisdiction arising out of it, are to be construed liberally for the dispatch of business and for the benefit of the public." These cases are not distinguishable from the present, except in the circumstance of the affidavits there having been sworn before the court itself, and here before a commissioner—by virtue of an authority delegated by the court. Besides, if the affidavit does not bring the matter before this court, the application to discharge the order of the Lord Chief Baron is improperly made to this court: it ought to have been addressed to the court over which he presides.

Whitehurst, in support of the order of Park, J.—The defendant having been arrested upon process issuing out of this court, the application could only be made here. The cases cited are wholly different from the present. The circumstances of *Ex parte Smith* were very peculiar: the motion, which was one almost of course, was unopposed, and the affidavit was sworn *in court*. *Winter* v. *Payne* arose upon a statute the language of which is altogether different from that of the statute now in question: to render a bill taxable, it is not necessary that the business should be transacted in one of the superior courts; a bill for business done at the Quarter Sessions, is taxable—*Ex parte Williams*, 4 T. R. 124, 496; or for business done in the insolvent debtors court—*Smith* v. *Wattle-*

(*b*) The motion was for the readmission of an attorney, under ordinary circumstances. The affidavit was sworn and delivered to counsel during the term, but had been mislaid at his chambers.

1838.

DRIFFIN v. TAYLOR.

worth, 4 B. & C. 364, 6 D. & R. 510, 1 C. & P. 615; and in many cases also though no business has been done in court at all. But, an affidavit to hold to bail is not "business depending in court;" it is preliminary to, but no part of the suit—*Richards* v. *Stuart*, 4 M. & Scott, 778, 10 Bing. 322. Until the issuing of the writ, there is clearly no business *in court*. The question is, whether the statute 11 Geo. 4 & 1 Will. 4, c. 102, s. 2, was intended to operate a repeal of the rule of Hilary Term, 48 Geo. 3, which (in all the courts) declared that "no person can be held to special bail in an action of trover or detinue, without an order made for that purpose by the Lord Chief Justice or one of the judges."

TINDAL, C. J.—I think this question may be determined by a reference to the words of the statute, which are so large and comprehensive as that to my apprehension they were intended to embrace the present case. The words of the second section are—"that every judge of the said courts [the superior courts], to whatever court he may belong, shall be, and he is hereby accordingly authorized to sit in London and Middlesex for the trial of issues arising in any of the said courts, and to transact such business at chambers or elsewhere, depending in any of the said courts, as relates to matters over which the said courts have a common jurisdiction, and as may, according to the course and practice of the court, be transacted by a single judge." It appears to me that the swearing an affidavit, whether before the court or before an officer authorized and appointed by the court to take affidavits, is a *business* depending in court. Strictly speaking, certainly, there is no *suit* depending. The word used in the statute is "business." Taking, therefore, the statute to bear the general interpretation I have put upon it, and not being desirous to fritter away and destroy its usefulness and convenience to the suitors and the public, I am of opinion that the

1838.

DRIFFIN v. TAYLOR.

Lord Chief Baron had jurisdiction to make the order in question, and consequently that the order of my Brother Park for rescinding such former order, must be discharged.

PARK, J.—The statute gives power to the judges indiscriminately to make orders touching any such business at chambers or elsewhere "depending" in any of the superior courts, as relates to matters over which the courts have a common jurisdiction: and the question is whether an affidavit to hold to bail sworn before a commissioner in the country, is a business depending in the court before whose commissioner the affidavit is sworn and out of which the process is intended to issue, so as to clothe the judges of the respective courts with the jurisdiction contemplated by the statute. The provision is a very wholesome one; it being absolutely necessary for the dispatch of business pending the circuits, that the judge who remains in town should have this extended power. When the parties came before me, I had considerable doubt as to the proper meaning of the word "depending:" but, upon further consideration, I entirely agree with the rest of the court, that, when an affidavit of this sort is made before a commissioner of this court, there is from that time a "business depending" in the court within the intent and meaning of the statute.

BOSANQUET, J.—I am also of opinion that this case is within the meaning of the 11 Geo. 4 & 1 Will. 4, c. 70, s. 4. Technically speaking, the swearing an affidavit of debt is not the commencement of a suit. In this section the legislature has departed from the ordinary language—purposely, no doubt: it gives power to each judge of the superior courts to transact at chambers or elsewhere any such *business* depending in either of the courts, and usually transacted at chambers, as relates to matters over which the courts have a common jurisdiction. Over actions of

1838.

DRIFFIN v. TAYLOR.

trover, and as to making orders for holding defendants to special bail in trover, the three courts have undoubtedly a common jurisdiction; and the latter is a matter which according to the course of practice is usually transacted by a single judge. The swearing the affidavit, relating to the commencement of a suit, and being done before an officer of the court, is clearly a "business depending" in the court.

COLTMAN, J., concurred.

Order discharged.

Thursday, April 19th.

The court will not prospectively direct in what manner costs shall be taxed.

ROE *v.* COBHAM.

ON the 20th October process issued against the defendant in this suit, the amount of debt indorsed thereon being 106*l.* 3*s.* 9*d.* On the 28th, the defendant took out a summons calling upon the plaintiff to shew cause why he should not accept 81*l.* 14*s.* 9*d.* and costs in satisfaction of his demand. The plaintiff declining to accept the sum offered, the summons was discharged, and the defendant paid the money into court, pleading it. Subsequently the plaintiff took the money out of court, and discontinued the action.

S. Martin, for the defendant, moved for a rule calling on the plaintiff to shew cause why the Master should not be directed to tax the defendant his costs incurred after the payment into court. He cited *James* v. *Raggett*, 2 B. & A. 776, 1 Chit. 471, *Hall* v. *Baker*, 2 Dowl. 125, *Gover* (or *Gower*) v. *Elkins*, 3 M. & W. 216, 6 Dowl. 335, and Archbold's Practice, 839.

PER CURIAM.—We cannot advise the parties, or prospectively direct the officer. Let him exercise his discretion. It is not to be assumed that he will decline to allow the defendant what the law gives him.

Rule refused (*c*).

(*c*) And see Marryott v. Clapp, 1 Dowl. 701; Willis v. Darke, 1 Tyr. & G. 503; Parsons v. Pitcher, 5 Scott, 791, 4 New Cases, 306.

1838.

Friday, April 20th.

WEBB *v.* SMITH.

In debt on the statute 2 Geo. 2, c. 24, s. 7, for bribery at a borough election, the declaration charged the defendant with having bribed three individuals (naming them) by corruptly giving to each of them 10*l.* The evidence was, that the defendant received the voters in a room of a house in the borough, saying to each as he came in, "I hope you are with us; we give 10*l.*; if the other side give more, we will give more too," or words to that effect; that he then gave to each voter a card with his (the voter's) name written on it; that the voter was then shewn into an inner room, where sat a stranger, who, as each presented his card, placed on the table a small parcel containing 10*l.*, which the voter took and retired;—Held, that this evidence sustained the declaration, and that it was properly left to the jury to say whether the two (the defendant and the man in the inner room) were not co-operating in the illegal act.

Held also, that evidence that the same ceremony was on the same day and at the same place gone through by the defendant and his coadjutor with other persons not named in the declaration, was admissible.

And that the precept to the returning officer was sufficiently proved by an examined copy obtained from the Crown-office, whither it appeared to have been returned together with the writ and indenture.

And, semble, that it is the sheriff's duty so to return the precept.

THIS was an action of debt upon the statute 2 Geo. 2, c. 24, s. 7, for bribery at an election of a member to serve in parliament for the borough of Bridgewater.

The declaration stated, that the borough of Bridgewater was an ancient borough, and that for a long space of time two burgesses of the said borough had been elected and sent, and had been used and accustomed, and of right ought to have been, and still ought to be elected and sent to serve as burgesses for the said borough in the parliament of this kingdom; that, on the 6th May, 1837, a certain writ of our late sovereign lord William the Fourth, &c., issued out of his said late majesty's court of Chancery at Westminster, directed to the sheriff of the county of Somerset, whereby—after reciting that John Temple Leader, Esq., was then duly chosen one of the burgesses for the borough of Bridgewater, in the said sheriff's county, for his late majesty's parliament summoned to be holden at his said late majesty's city of Westminster on the 19th February, in the fifth year of his said late majesty's reign, on which day his said late majesty's parliament was begun and holden, and from thence, by several adjournments and prorogations, had been adjourned and prorogued, and was there then holden; and that the said John Temple Leader, having been so chosen a burgess for the said borough, had since accepted the office of steward or bailiff of his said late majesty's three Chiltern

1838.

WEBB v. SMITH.

Hundreds of Stoke, Desborough, and Bonenham, in the county of Buckingham, as by a letter of his said late majesty's right trusty and well-beloved councillor, James Abercromby, Speaker of his said late majesty's lower House of Parliament, more fully and plainly appeared; by means whereof his said late majesty's subjects of the said borough of Bridgewater were deprived of one burgess to treat for the benefit of the same borough in his said late majesty's parliament; nevertheless, his said late majesty, being unwilling that the commonalty of his kingdom in his said parliament assembled to treat of business concerning his said late majesty, the state and defence of his kingdom and the church, from the aforesaid cause should be diminished or lessened, whereby those affairs might not have a due end—his said late majesty commanded the said sheriff, that, in the place of the said John Temple Leader, within the borough aforesaid, one other fit and discreet burgess of the aforesaid borough (proclamation being first made of the premises, and of the day and place), freely and indifferently by those who should be present at the proclamation, according to the form of the statute in that case made and provided, the said sheriff should cause to be elected, and the name of such burgess to be inserted in certain indentures to be thereupon made between the said sheriff and those who should be present at such election, whether at the said election he should be present or absent, and should cause him to come to the said parliament, so that the same burgess so to be chosen might have full power and sufficient authority for himself and the commonalty of the aforesaid borough, to do and consent to those things which in his late majesty's parliament aforesaid, by the common council of his said late majesty's realm, by the Blessing of God, should happen to be ordained upon the said affairs; willing, nevertheless, that neither the said sheriff nor any other sheriff of that his said late majesty's kingdom in any wise should be elected; and the election

1838.

WEBB v. SMITH.

so made, distinctly and openly under the said sheriff's seal and the seals of those who should be present at such election, the said sheriff should certify to his said late majesty in his Chancery forthwith, remitting to his said late majesty one part of the said indentures annexed to the said writ, together with the said writ: which said writ, afterwards, and before the return thereof, to wit, on the 7th May, 1837, aforesaid, was delivered to Alexander Adair, Esq., who then and from thence until and at and after the return of the said writ, was sheriff of the said county of Somerset, to be executed in due form of law: By virtue of which said writ, afterwards, and before the return thereof, to wit, on &c., the said Alexander Adair, then being such sheriff as aforesaid, made his certain precept in writing, under the seal of his said office of sheriff of the said county of Somerset, directed to the mayor, aldermen, and burgesses of the said borough of Bridgewater, for the election there of one burgess for the said borough in the place of the said John Temple Leader, according to the said writ: By virtue of which said precept, afterwards, and before the return of the said writ, to wit, on the 15th May, in the year aforesaid, the election of one burgess for the said borough was had and made: It was then averred, that, before and at the said election, Henry Broadwood, Esq., was a candidate that he might be elected and returned to serve as one of the burgesses for the said borough in the aforesaid then next parliament: yet the defendant, well knowing the premises, but not regarding the statute in such case made and provided, before the said election for the said borough, to wit, on &c., did corrupt one Isaac Jones, who then claimed to have a right to vote in the said election, to give his vote in that election for the said Henry Broadwood, so being such candidate as aforesaid, by then corruptly giving to the said Isaac Jones a large sum of money, to wit, 10*l.*, which said sum of 10*l.* was then given by the defendant to the said Isaac Jones as and for

1838.

WEBB v. SMITH.

a reward to the said Isaac Jones, to give his vote in the said election for the said Henry Broadwood, contrary to the form of the statute in such case made; whereby and by force of the same statute the defendant forfeited for his said offence the sum of 500*l.*, and an action accrued to the plaintiff to demand and have of and from the defendant the said sum of 500*l.*

Other two acts of bribery was also charged in the declaration, the parties bribed being Henry Bradford and Thomas Bennett.

The cause was tried before Bosanquet, J., at the last Assizes at Taunton. The following facts appeared in evidence:—The 15th May, 1837 (Monday), was the day fixed for the nomination of candidates for the borough of Bridgewater. The polling was to commence on the 16th. Mr. Broadwood was one of the candidates. On Sunday, the 14th, a house in the town was open for election purposes by parties in the interest of Mr. Broadwood. The defendant was there, in a front room. In a back room, opening from the front room, and partially obscured, an individual, a stranger to the town, sat at a table. The voters were received in the front room by the defendant, who observed to each—"I hope you will be with us; we give 10*l.*: if the other side give more, we will give more too"—or words to that effect. The parties assenting then received from the defendant a card, with the voter's name written on it, and were ushered into the back room, where in exchange for the card each received from the stranger at the table a small parcel containing 10*l.* The three individuals named in the declaration, Isaac Jones, Henry Bradford, and Thomas Bennett, were proved each to have received from the defendant a card, and a parcel from the stranger, in the manner above described. All the parties so bribed voted for Mr. Broadwood (*d*).

(*d*) The action will lie though the party does not vote according to the bribe. Sulston v. Norton, 3 Burr. 1235. And see Bush v.

1838.

WEBB v. SMITH.

The plaintiff also offered evidence to shew that several others besides those named, had in like manner received cards and parcels. It was objected for the defendant that this evidence was not relevant to the issue. The learned judge over-ruled the objection, holding that the evidence was admissible for the purpose of shewing that the same course had been pursued throughout the day, and that the defendant was cognisant of and party to what was going on in the inner room.

Evidence objected to.

In order to prove the precept from the sheriff of Somersetshire to the mayor of Bridgewater, the plaintiff produced an examined copy of the writ, the precept, and the return, from the Crown-office. The under-sheriff, who was called as a witness, stated, that, on occasions of this sort, he *generally* kept the warrants; that he *sometimes* sent them up to the Crown-office with the return and the indentures; that he could not state that this particular warrant had been so sent up; but that he had searched in his office, and could not find it there, and therefore he had no doubt but he had sent it to the Crown-office. It was objected, on the part of the defendant, that this was no evidence; that the precept itself should be produced; and that, at all events, this was not a proper examined copy of it, the Crown-office not being the proper place of deposit for the precept, and it being no part of the sheriff's duty to return it there.

Examined copy of precept.

The learned judge told the jury that the question for their consideration was, whether or not the defendant and the stranger were co-operating; that, if they were

Summing up.

Rawlins, cited id. 1236, where it was resolved, "that the *giving* a bribe to forbear voting at the election of a member to parliament, was an offence within this same clause and act, although the man did *not* forbear to vote, but actually voted for the opponent candidate;" and "that there was no need for the plaintiff to allege in his declaration that the man did actually give or forbear his vote according to his promise." See, also, Combe v. Pitt, 3 Burr. 1586.

1838.

WEBB v. SMITH.

co-operating, the act of the one was the act of both; and that, if they believed the statements made by the witnesses who spoke to the mode in which the alleged bribery was conducted, they must find for the plaintiff.

The jury returned a verdict for the plaintiff, for the amount of one penalty.

Bompas, Serjeant, on the first day of this term, pursuant to leave reserved to him at the trial, moved for a nonsuit, on the ground that the production of the precept itself was essential to the maintenance of the action; and for a new trial, on the ground of the improper reception of evidence, and also on the ground of misdirection.

1. As to the sufficiency of the proof of the precept.

1. The original precept should have been produced. The ground upon which examined copies of public documents are allowed to be given in evidence, is thus stated by Mr. Starkie, Evid. Part II. § 36: "Not only records, but all public documents which cannot be removed from one place to another, may be proved by means of a copy proved on oath to have been examined with the original. This is to be considered as a deviation from the general rule, that the best evidence must always be produced, for the sake of public convenience. The copy must be one of a complete record, for, until it become a permanent record, it is transferable, and the reason for admitting a copy to be evidence does not apply." The precept here is no record; it is a mere sheriff's warrant. The Crown-office was not the proper place of custody for the precept: the sheriff's office is the place where it should have remained. It was not competent, therefore, to the officers at the Crown-office to intercept or prevent the production of the original, which can only be excused on the ground before stated, and that the document is in the custody of an authorized person. In *Adamthwaite* v. *Synge*, 4 Camp. 372, a witness called to prove an examined

1838.

WEBB v. SMITH.

copy of a judgment of the court of Exchequer in Ireland, stated that he was taken by an attorney at Dublin to a room over the Four Courts there, where he was shewn a parchment roll, with which he compared the copy in question. In this room were deposited the records of all the superior Irish courts, in different presses, marked with the names of the different courts respectively. But the witness did not see from whence the roll produced to him was taken, nor did he know who or what the person was who produced it, nor did he hear any thing said upon the subject when it was produced, or while the examination was going forward. Upon an objection being made to the sufficiency of this evidence, Lord Ellenborough said: "I cannot look at the copy till I have evidence that it was examined with a record of the court of Exchequer in Ireland; and no such evidence has been brought forward. The attorney who introduced the witness into the place, might have carried the supposed roll along with him in his pocket, having first manufactured it himself. We do not know that it was even produced by a person acting as an officer of the court, or that it was ever stated at the time to be the record of a judgment. To allow this evidence to be sufficient, would be establishing a precedent which might lead to very inconvenient and dangerous laxity." [*Tindal*, C. J.—Here, the under-sheriff stated that he had no doubt but the precept had been returned with the other documents to the Crown-office; and there it is found: I cannot say that the Crown-office was an improper place of custody for it.] There is no legal evidence that it *was* there. And its being found there would not change its nature. It was no part of the sheriff's duty to return it; it is not even alluded to in the return [*Bosanquet*, J.—I thought, that, if the precept were in the hands of the sheriff, it must be produced; but that, if transmitted to the Crown-office, it became a record, or part of a record, and an examined copy would then be evidence.]

1838.

WEBB v. SMITH.

2. As to the improper reception of evidence.

2. As to the improper reception of evidence—The declaration contained three distinct charges of bribing three several persons. Evidence was offered, and received, to shew that other parties, not named in the declaration, had also received bribes in the manner described. How could the defendant be prepared to meet such evidence? As well might it be attempted, upon an indictment for one act of felony, to prove another, or, in an action for one libel, to prove the publication of a different libel, to shew the animus (*e*).

3. As to the alleged misdirection.

2 Geo. 2, c. 24, s. 7.

3. As to the misdirection—The evidence did not support the declaration. The offence is thus described in the statute:—"If any person, by himself or any person employed by him, doth or shall by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure any person or persons to give his or their vote or votes, or to forbear to give his or their vote or votes in any such election, such person so offending shall for every such offence forfeit the sum of 500*l.*" (*f*). In

(*e*) In an action of slander, words spoken by the defendant in relation to the same transaction, on a *former* occasion, are receivable in evidence to shew the animus—Jackson v. Adams, 2 Scott, 598.

In Tarpley v. Blaby, 2 Scott, 642, to prove the publication by the defendant of a libel on the plaintiff contained in a letter printed in a newspaper, a manuscript of the defendant, through several passages of which the editor had before it was composed drawn his pen, was produced. The printed libel, being also produced, was found to correspond exactly with the unobliterated parts of the manuscript. The portions of the manuscript through which the pen was drawn were of a more libellous tendency than the parts published in the newspaper, and did not in any degree qualify them: it was held that the manuscript was receivable in evidence, the portions that corresponded with the printed libel to prove the publication by the defendant, and the residue to shew quo animo the libel was published.

(*f*) To be recovered, together with full costs of suit, by action of debt, &c., in any of his majesty's courts of record at Westminster; "and every person offending in any of the cases aforesaid, from and after judgment obtained against him in any

1838.

WEBB v. SMITH.

the declaration the defendant is charged with having corrupted "one Isaac Jones, who then claimed to have a right to vote in the said election, to give his vote in that election for the said Henry Broadwood, so being such candidate as aforesaid, by then *corruptly giving to the said Isaac Jones a large sum of money, to wit*, 10*l.*" All that the evidence shewed, was, that the defendant had certain conversations with certain electors, and gave each of them a card with his own name written thereon, which the parties took into another room, where another person (who was not shewn to have been employed by, or to have had the slighest connexion with the defendant) gave them each a small parcel, which might contain money. Even supposing the defendant knew that the stranger in the inner room intended to give bribes, his knowledge of the fact would not make him a participator in the offence. [*Tindal*, C. J.—The statute intends to fix the penalty on the person whose mind is moving, as well as upon the agent whose hand actually gives the bribe]. At all events, the transaction should have been stated according to the fact: if the defendant gave a cheque or a note, it should have been so averred. The statute makes a marked distinction between a gift and a promise or security for a gift: the declaration makes none. Suppose the man in the inner room said to the defendant, "Send the voters in, and I will give them 10*l.*;" and the defendant sent them in—would that make him liable, though he exercised no sort of control over the money? [*Bosanquet*, J.—Until the defendant sent in the names, there was no money forth-

such action of debt, &c., or being any otherwise lawfully convicted thereof, shall for ever be disabled to vote in any election of any member or members to parliament, and also shall for ever be disabled to hold, exercise, or enjoy any office or franchise to which he and they then shall or at any time afterwards may be entitled as a member of any city, borough, town corporate, or cinque port, as if such person was naturally dead."

1838.

WEBB v. SMITH.

vote; that those who consented to vote for Mr. Broadwood received from the defendant each a card or ticket with his name written on it; that he then went into an inner room, put down the card, and received 10*l*. In order to shew that the defendant knew what would be the effect of his giving the cards or tickets, it was material and important to prove the manner in which he acted in the same place, on the same day, towards other persons than those to whom the charges in the declaration referred. If the defendant were cognisant of what was going on in the inner room, I am clearly of opinion that the act of the individual in that room was the act of the defendant. Had the evidence in question been offered for the purpose of shewing that the defendant had at another time and place, and under different circumstances, corrupted other voters, I agree that it would not have been receivable. But here the time and place and the mode of conducting the affair were the same: it was part of one and the same transaction. The case, therefore, bears a strong analogy to that of two persons going out for the purpose of uttering counterfeit coin (*h*).

(*h*) By the 2 Will. 4, c. 34, s. 7, it is enacted, "That, if any person shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin, knowing the same to be false or counterfeit, and such person shall, at the time of such tendering, uttering, or putting off, have in his possession, besides the false or counterfeit coin so tendered, uttered, or put off, one or more piece or pieces of false or counterfeit coin resembling or apparently, intended to resemble or pass for any of the king's current gold or silver coin, &c., every such offender shall be guilty of a misdemeanour," &c. In Rex v. Skerrett, 2 C. & P. 427, where two prisoners were indicted under this statute, for uttering a counterfeit shilling, having another counterfeit shilling in their possession, and it appeared that the two prisoners went to a shop, and that one of them went in and uttered the counterfeit shilling, having no more in her possession, and the other prisoner stayed outside the shop, having other pieces of bad money; it was held that both might be convicted, the uttering and the possession being both joint.

1838.

WEBB v. SMITH.

As to the mode in which the offence is charged—I am unable to discover in what other way the transaction could be described than as a gift of money. It is contended, that, inasmuch as the money was not actually given to the voters by the hand of the defendant, the evidence does not sustain the action. The agent who negotiates with the voter and gives him the money, is clearly liable to the penalties imposed by the act. It seems to me that the giving a card to the voter, knowing that it will enable him to walk into the next room and obtain the money, is precisely the same as if the party who gave the money was a mere purse-bearer, dealing it out in obedience to the defendant's verbal directions. There cannot be a doubt but that the two were co-operating and equally guilty.

COLTMAN, J.—The enactment in question points at two distinct cases—the one, bribery by the party himself —the other, bribery through the means of an agent. Here, the defendant, who was co-operating with the unknown man in the inner room by whom the money was actually paid, was, under the circumstances, properly charged as a principal. For the purpose of shewing such co-operation, evidence of other acts that reflected light upon the acts specifically charged in the declaration, of the same description, and committed at the same time and place, and under precisely the same circumstances in all respects, was, I think, clearly admissible. In criminal cases, even, where there is always a strong desire not to embarrass or to aggravate the already sufficiently painful situation of the prisoner, this sort of evidence is frequently received.

Cur. adv. vult.

TINDAL, C. J., now delivered the opinion of the court upon the point reserved:—

We have been furnished with copies of the writ, the precept from the sheriff to the mayor of Bridgewater, and

1838.

WEBB v. SMITH.

the indentures returned to the Crown-office. Having looked at them, we are of opinion that the examined copy of the precept was properly admitted at the trial. It appears that the plaintiff's agent made application at the Crown-office for the document in question, and that he received from the proper officer there examined copies of the writ, precept, and indentures. It was objected, on the part of the defendant, that the precept from the sheriff to the returning officer ought not to have been returned to the Crown-office, and therefore that an examined or office copy was not sufficient evidence, but that the original document should have been produced. The ground the argument is put upon, is, that there is no duty by law imposed upon the sheriff to return the precept to the Crown-office. From the evidence given by the under-sheriff at the trial, it appears that the practice is rather loose; sometimes the precept is returned to the Crown-office, and sometimes it is retained by the sheriff: and, as to this particular one, the witness stated that he had searched for it in his office, and could not find it; and therefore he concluded that it had been returned. Looking, however, at the exigency of the writ, it appears to us that it *is* the sheriff's duty to return the precept. By the writ the sheriff is required to cause a burgess to be elected, to cause the name of such burgess to be inserted in certain indentures to be thereupon made between the sheriff and those who should be present at such election, and to cause him to come to parliament, and the election so made to certify under his (the sheriff's) seal and the seals of those who should be present at such election to his majesty in his Chancery, remitting one part of the ndentures annexed to the said writ, together with the said writ. The sheriff thereupon makes his precept to the returning officer, requiring him to "cause a burgess to be elected for the said borough, according to the tenor of the said writ, and how that his writ should be executed he should make known to him immediately

1838.

WEBB v. SMITH.

after the said election made, so that he might certify the same, together with that writ, and that precept, to our lord the king in his Chancery." The sheriff, therefore, requires the subordinate officer to certify and return this very precept: and accordingly, when the indentures are handed over to the sheriff, the precept is thus marked:—"The execution of this precept appears by a certain indenture hereunto annexed." The indenture itself is not intelligible unless accompanied by the precept. The sheriff then makes his return to the writ thus:—"The execution of this writ appears in certain schedules hereunto annexed. A. A., sheriff." The schedules referred to are, one part of the indentures, and the precept, the other part of the indentures remaining with the returning officer. If, therefore, the precept is not always returned to the Crown-office, the under-sheriff is guilty of negligence. In the case of *Mead* v. *Robinson*, Willes, 422, the objection was taken on the opposite ground—so difficult it is to please all defendants! There the original precept was produced, and it was objected that it ought to have been returned with the indentures, and filed in Chancery, and an examined copy produced: and it was then found, as now, that these documents were not always returned.

Rule refused.

DOE *d.* GEORGE GATEHOUSE *v.* REES.

Saturday, April 21st.

THIS was an action of ejectment brought to recover possession of a public-house at Chichester demised in the

The defendant held premises under a lease containing a proviso for re-entry by the lessor in case the lessee should become bankrupt or insolvent, or his term or interest in the premises should be taken in execution for any debt. The defendant took the benefit of the insolvent debtors act in January, 1836. This forfeiture was waived by the acceptance of rent by the lessor down to Christmas, 1837. In ejectment for breach of the condition, the demise being laid on the 26th January, 1838:—Held, that evidence that the debts enumerated in the defendant's schedule *remained unsatisfied*, and that the defendant had contracted a new debt, which he had been asked to pay, and had not paid—did not shew a continuing "insolvency," so as to constitute a breach of the condition.

1838.

DOE d. GATEHOUSE v. REES.

year 1831 by George Gatehouse and another, subject to a covenant or condition that the lease should be void, in case the lessee became bankrupt or insolvent, or his term or interest therein should be taken in execution for any debt (*i*). The action was brought for an alleged breach of this condition. The demise was laid on the 26th January, 1838.

The cause was tried before Vaughan, J., at the last Assizes for Sussex. It appeared, that, in the year 1836, the lessee had obtained his discharge under the insolvent debtors act, a considerable sum being then due from him to the Messrs. Gatehouse for beer: and it was contended on the part of the lessor of the plaintiff that the lease was forfeited for this breach of the condition. It appearing, however, that the lessors had received rent down to Christmas, 1837, the learned judge was of opinion that the forfeiture was waived (*k*). It was proved, on the part of the lessors of the plaintiff, that the debt due from the defendant to the Messrs. Gatehouse at the time of his discharge had never been paid: and it was contended, that, inasmuch as the discharge under the insolvent debtors act did not operate an extinguishment or release of the debt, this was a continuing insolvency, and consequently a continuing breach. Evidence was also given that the defendant was in arrear with his brewers upon the new account: but it did not appear that he had been subjected to any pressure.

The jury having under the direction of the learned judge returned a verdict for the defendant—

(*i*) See Roe d. Hunter v. Galliers, 2 T. R. 133; Church v. Browne, 15 Ves. 268; Rex v. Topping, M'Clel. & Y. 544; Davis v. Eyton, 4 & P. 820, 7 Bing. 154.

(*k*) See Roe d. Gregson v. Harrison, 2 T. R. 425; Goodright d. Walter v. Davids, Cowp. 803; Doe d. Cheyney v. Batten, Cowp. 243, 9 East, 314, n.; Fawcett, v. Hall, 1 Alcock & Nap. 248; Doe d. Bryan v. Bancks, 4 B. & A. 401, Gow, 220; Arnsby v. Woodward, 6 B. & C. 519, 9 D. & R. 536.

1838.

DOE d. GATEHOUSE v. REES.

Andrews, Serjeant, now moved for a new trial, on the ground of misdirection.—Admitting the forfeiture resulting from the lessee's getting discharged under the act to have been waived by the subsequent receipt of rent, still the fact of the debt due to the Messrs. Gatehouse remaining undischarged, was conclusive to shew a continuing insolvency sufficient to operate a forfeiture within the meaning of the condition. In *Parker* v. *Gossage*, 2 C. M. & R. 617, A. and B. agreed for the sale by B. to A. of all the salt that should be manufactured at certain salt works of B.; all payments to be made quarterly, by acceptance at three months; the agreement to continue binding for fourteen years, but *bankruptcy* or *insolvency* on the part of A. was to terminate the contract: it was held that *insolvency* meant an inability in A. to pay his just debts, and did not import that he should have been discharged under the insolvent debtors act. And in *Biddlecombe* v. *Bond*, 4 Ad. & E. 332, 5 N. & M. 621, the defendant gave a warrant of attorney to the plaintiff to secure the payment of a debt by instalments. Shortly before the first instalment was due the defendant told the plaintiff that he feared he could not meet it, and that, unless time was given to him, he would make over his effects for the benefit of his creditors. An agreement was then entered into between the plaintiff and defendant, that the defendant should give his acceptance for a part, and pay the rest by instalments according to his ability, so as to discharge all before April, 1, 1836, and that the plaintiff should not enter up judgment unless the defendant should dispose of his business or *become bankrupt or insolvent*. The defendant paid the acceptance when due. Afterwards, and before the 1st April, 1836, the defendant asked the plaintiff to make him a bankrupt, in order to relieve him from his difficulties, and said that he could not pay 20*s*. in the pound, and that his assets were 200*l*., and his debts 300*l*. It was held, that the plaintiff

1838.

DOE d. GATEHOUSE v. REES.

might enter up judgment and take out execution, the defendant appearing to be *insolvent* in the sense contemplated in the agreement; and that the expression "becoming insolvent" means a general inability to pay debts, and does not signify taking the benefit of the insolvent debtors act, unless the context so restrains it. And Patteson, J., says: "It would require a very strong case to shew that the meaning of the word was restrained to taking the benefit of the act. If the context does not shew something to induce us to put such an interpretation on the word, we must hold it to be intended of a general inability to pay debts." [*Tindal*, C. J.—Who is to say that the defendant is insolvent, unless the plaintiff give some evidence of insolvency? He may be of ability to satisfy all demands against his estate, and yet refuse to do so; or the assignee of the insolvent debtors court may have neglected his duty.] Coleridge J., in the case last cited, says: "The burthen of proof is on the defendant, who owes money for which he has given a warrant of attorney, and seeks to preclude the plaintiff from the ordinary remedy. If he can oust the plaintiff from that remedy, he must do it by shewing that the proceeding is contrary to good faith. The word 'insolvent' *may* have the general meaning which the plaintiff seeks to give it: the defendant is to shew that it *cannot have* that meaning, which he has not done." [*Bosanquet*, J.—It lies upon the lessor of the plaintiff here, who claims a right to re-enter for breach of the condition, to shew the condition broken.] The question of insolvency, at all events, should have been left to the jury (*l*).

TINDAL, C. J.—The whole question turns upon the true construction to be put upon the terms of the proviso or condition in the lease, by which it was to be voidable, and voidable only, in case the lessee should become bankrupt

(*l*) See Shears v. Rogers, 3 B. & Ad. 362.

1838.

DOE d. GATEHOUSE v. REES.

or insolvent, or his term or interest in the premises should be taken in execution for any debt (*m*). Being voidable only, and not void, by reason of the breach of this condition, the forfeiture might be waived by the lessor. It appears to me, that, by the receipt of the rent reserved in the lease down to Christmas, 1837, the lessor has acknowledged the lessee to be still his tenant, and thereby waived the antecedent forfeiture. If the relation of landlord and tenant or lessor and lessee subsisted between the parties down to the period mentioned, has anything occurred since to give the former a right to re-enter? It is contended that the debts due from the lessee at the time he obtained his discharge under the insolvent debtors act, not being extinguished or released by the insolvent's personal discharge, the fact of their remaining unsatisfied constitutes a continuing "insolvency" within the meaning of the proviso. If that were so, the mere fact of a single debt remaining unpaid, without any proof of pressure on the part of the creditor, or inability on the part of the debtor, would constitute a state of insolvency. That never could be the meaning of this condition. The cases cited do not appear to me to govern the present: no general inability in the defendant to pay his debts was here proved. I therefore think there is no ground for disturbing the verdict.

PARK, J., concurred.

BOSANQUET, J.—I am of the same opinion. The cases establish this—that "insolvency" is not confined to the taking the benefit of the insolvent debtors act, but may, according to the context, mean a general inability in a party to pay his debts. It appears that in January, 1836, this defendant was discharged under the act. That un-

(*m*) See Daken v. Cope, 1 Russ. 170; Arnsby v. Woodward, 6 B. & C. 519, 9 D. & R. 536.

1838.

DOE d. GATEHOUSE v. REES.

doubtedly was a breach of the condition, of which the lessor might then have taken advantage. He did not, however, do so, but received rent down to Christmas, 1837, and thus waived the forfeiture. That is admitted: but then it is said, that, inasmuch as the debts due from the insolvent at the time of his discharge still remain unsatisfied, he was *insolvent*, within the meaning of the condition, between Christmas, 1837, and the day of the demise laid in the declaration, viz. the 26th January, 1838. The onus of proving the lessee's insolvency lay upon the lessor of the plaintiff. The only proof offered was, that a certain debt was due from the insolvent to the Messrs. Gatehouse at the time of his discharge; and that that debt remained unsatisfied. No evidence was given as to the then state of his effects. Some evidence was given of a new debt; but no pressure was shewn: therefore no argument of insolvency could be founded on that.

COLTMAN, J.—This being an ejectment for a forfeiture, it was incumbent on the lessor of the plaintiff strictly to make out his case (*n*). I think the evidence offered was not sufficient to shew the lessee to be insolvent within the meaning of the condition. His discharge under the insolvent debtors act in January, 1836, was properly admitted to be out of the question. And the mere circumstance of his beer account being in arrear, and his neglect to pay on demand, clearly was not sufficient to establish a forfeiture.

Rule refused.

(*n*) Provisos for re-entry in leases are to be construed like other contracts; not with the strictness of conditions at common law—Doe d. Davis v. Elsam, M. & M. 189.

1838.

Saturday, April 21st.

HALL *v.* SWIFT.

In an action for the obstruction of a watercourse, it appeared that the plaintiff had three years ago slightly altered the course of the stream, at a point between its exit from the defendant's land, where the obstruction took place, and its entrance upon his own land; and that, more than twenty years ago the stream had for some time ceased to flow to the plaintiff's land, and had resumed its antient course only nineteen years before the commencement of the action:—Held, that the plaintiff's right was not thereby destroyed.

THIS was an action on the case for an alleged obstruction of a watercourse, tried before Alderson, B., at the last Assizes at Stafford.

The declaration stated that the plaintiff, before and at the time of the committing of the grievances by the defendant thereinafter mentioned, was, and from thence hitherto had been and still was seised in his demesne as of fee of and in certain lands and premises, with the appurtenances, situate in the county of Stafford; and by reason thereof, long before and at the time of the committing of the grievances thereinafter mentioned, of right ought to have had and enjoyed, and still of right ought to have and enjoy the benefit and advantage of the water of a certain stream or water-course, which during all that time of right ought to have run and flowed, and still of right ought to run and flow unto and into the said lands and premises of the plaintiff, for the supplying the same with water, and for irrigating and watering of the said lands and premises, and for the benefit and improvement of the soil thereof, and for the use of the plaintiff in his trade and business of a currier, and otherwise, and of the cattle of the plaintiff depasturing in the said lands and premises: averment that the defendant wrongfully obstructed and diverted the stream above the premises of the plaintiff, to his injury.

The defendant pleaded—first, not guilty—secondly, a denial of the plaintiff's right to the use of the water.

The facts were these:—The defendant was the owner of a field called Wasteds, which was separated by a hedge from a lane called Spout Lane; the land on the other side of the lane belonging to the plaintiff. The stream in question flowed from springs rising in Wasteds through a drain or under-ground course to a spout in the hedge,

1838.

HALL v. SWIFT.

and thence across Spout Lane to the plaintiff's land. The stream had formerly run a few yards down the lane before it crossed to the plaintiff's land; but, in the year 1835, the plaintiff had altered it so as to make it run straight from the spout in the hedge to his premises. The alleged obstruction (which was in the field called Wasteds) was proved to have gradually increased, until the supply was altogether stopped. The only positive obstruction by the act of the defendant that appeared, was, that, upon two or three occasions, he had directed his servants to place a turf at the embouchure of the drain, for the purposes of irrigating his field. The ultimate stoppage being occasioned by the intrusion of the roots of a tree growing upon the defendant's land, whose fibres grew into and filled up the channel. It was also proved that about forty years ago the water had ceased to flow in the channel in question, and had only commenced flowing again about nineteen years since.

On the part of the defendant, it was contended, that the evidence did not support the right claimed, by reason of the recent alteration in the course of the stream; and that the antient right had been lost by desuetude.

The learned judge left it to the jury to say whether or not the plaintiff or those under whom he claimed had had twenty years' enjoyment, and whether or not the defendant had obstructed him in it. The jury found for the plaintiff, with nominal damages.

Maule, on a former day, moved for a new trial, on the grounds urged at the trial.—He submitted that the alteration in the course of the stream in 1835 destroyed the prescriptive right claimed in the declaration; that the interruption of the antient right, which was proved to have continued down to a period considerably within twenty years of the commencement of the action, amounted to a destruction or abandonment of that right; and that the

jury were not warranted in ascribing the obstruction complained of to the act of the defendant.

1838.

HALL v. SWIFT.

TINDAL, C. J.—I am clearly of opinion that there is no pretence for the first objection. The declaration states that the plaintiff was seised of certain lands and premises, and by reason thereof of right ought to have had and enjoyed, and still of right ought to have and enjoy the benefit and advantage of the water of a certain stream or watercouse, which of right ought to have run and flowed, and still of right ought to run and flow unto and into the said lands and premises of the plaintiff, for the supplying the same with water, and for the irrigating and watering of the said lands and premises, and for the benefit and improvement of the soil thereof, &c. It appeared from the evidence, that the stream had its rise in land of defendant's, whence it flowed by an underground channel to a lane dividing the defendant's land from the plaintiff's; that formerly the stream meandered a little down the lane before it flowed into the plaintiff's land; and that, in the year 1835, the plaintiff, in order to render its enjoyment more commodious to himself, a little varied the course by making a straight cut direct from the opening or spout under the defendant's hedge across the lane to his own premises. And this, it has been contended, negatives the right claimed in the declaration. I agree, that, if the course of the water had been set out or described by metes and bounds, a variance between the statement and the proof might have been fatal. But here the right is described generally. If such an objection as this were allowed to prevail, any right, however antient, might be lost by the most minute alteration in the mode of enjoyment: the making straight a crooked bank or foot-path would have this result. No authority has been cited, nor am I aware of any principle of law or common sense upon which such an argument can base

1838.

HALL v. SWIFT.

itself.—It is further objected that the right claim has been lost by desuetude, the water having many years since discontinued to flow in its accustomed channel, and having only recommenced flowing nineteen years ago. That interruption, however, may have been occasioned by the excessive dryness of seasons or from some other cause over which the plaintiff had no control. But it would be too much to hold that his right is therefore gone; otherwise, I am at a loss to see why the intervention of a single dry season might not deprive a party of a right of this description, however long the course of enjoyment might be.—With regard to the last objection, that the verdict was not warranted by the evidence, we will consult the learned judge who presided at the trial before we determine whether or not a rule shall be granted.

TINDAL, C. J., on this day said that one of the learned judges had communicated with Mr. Justice Alderson, who stated that the facts were fully and fairly left to the jury, and that he was not dissatisfied with the verdict; and therefore that the court declined to grant a rule.

Rule refused.

Tuesday, April 24th.

A judge at Chambers having made an order requiring an attorney to deliver up to the husband (who had paid for it) the *draft* of a marriage settlement under which he (the attorney) was a trustee—The court refused to set aside the order.

Ex parte HOLDSWORTH.

BY a judge's order, Mr. Callow, an attorney of this court, was directed to deliver up to Mr. Holdsworth the draft of that gentleman's marriage settlement, which had been prepared by Mr. Callow, and the charges for which had been paid to him by Mr. Holdsworth. Mr. Callow was one of the trustees, and as such claimed a right to retain the draft.

Bompas, Serjeant, moved to set aside this order.—He submitted, that, inasmuch as Mr. Callow held the draft in

1838.

Ex parte HOLDSWORTH.

question, not as the attorney of Mr. Holdsworth, but as trustee (*o*), he could not be called upon to deliver it up; the trustees being the legal owners of the property, and consequently of the deeds and drafts relating thereto. He cited *Harrington* v. *Price*, 3 B. & Ad. 170, *Lightfoot* v. *Keane*, 1 M. & Welsby, 745, and *Lord* v. *Wardle*, 3 New Cases, 680, 4 Scott, 402; and attempted to distinguish the present case from *In re Horsfall*, 1 M. & R. 306, 7 B. & C. 528, where it was held that an attorney, when ordered to deliver up papers of his client, must deliver up the drafts of deeds, for which he has charged and been paid, as well as the deeds themselves, because there the applicant was the owner of the deeds.

TINDAL, C. J.—Had the object of the application to my Brother Vaughan been to compel Mr. Callow to deliver up the deed, its result is obvious enough. But the question is whether the cestui que trust is not entitled to be acquainted with the contents of the deed. It seems strange to say that a party liable to the performance of covenants shall not have the means of knowing what those covenants require of him. Instead of asking for a copy of the settlement, the party demands that the draft, which he has paid for, may be handed over to him. I think he has a right to it. If the draft contained anything that it would under given circumstances be improper that Mr. Holdsworth should be informed of, the case might be different. But then that should be made to appear by affidavit. There is, however, neither affidavit nor suggestion of that sort: the simple question presented to us is, whether Mr. Callow, by reason of his character of trustee, has a right to withhold this draft. I think there is no ground for setting aside the order of the learned judge.

(*o*) See Pearson v. Sutton, 5 Taunt. 364; Ex parte Moxon, 1 Dowl. 7.

1838.

Ex parte HOLDSWORTH.

PARK, J.—The applicant has an unquestionable right to the draft for which he has paid.

The rest of the court concurring—

Rule refused.

Thursday, April 26th.

The defendant was the sole occupier of certain open and uninclosed downs in the county of Surrey; the defendant had a right of common upon the adjoining downs; the boundaries of the respective downs being ascertained only by posts placed at short distances in the ground:—Held, that, under the circumstances, common pur cause de vicinage could not be set up as an excuse for the trespassing of the plaintiff's cattle upon the downs so occupied by the defendant.

HEATH *v.* ELLIOTT.

REPLEVIN for taking the plaintiff's sheep, on the 15th October, 1836, in the parish of Houghton, in the county of Sussex, in a certain open common or down there, called Houghton Down.

The defendant in his avowry stated, that, at the time of making the demise thereinafter mentioned, Bernard Edward, Duke of Norfolk, was seised of and in the place in which &c., with the appurtenances, in his demesne as of fee, and, being so seised, the said Duke, before the said time when &c., to wit, on &c., demised the said place in which &c., with the appurtenances (among other things), to the defendant, to have and to hold the same to the said defendant as tenant for one whole year, and so from year to year so long as the defendant and the said Duke should respectively please: by virtue of which said demise the defendant afterwards, and before the said time when &c., to wit &c., entered into the said place in which &c., with the appurtenances, and became, and until and at the said time when &c. was lawfully possessed thereof; and because the said cattle in the declaration mentioned, at the said time when &c., were wrongfully and injuriously in the said place in which &c., treading down and depasturing the grass and herbage there then growing, and doing damage there to the defendant, the defendant avowed &c., as and for and in the name of a distress for the said damage so there done and doing as aforesaid.

Plea.

The plaintiff pleaded, that the said place in the declaration mentioned, in the parish of Houghton aforesaid,

1838.

HEATH v. ELLIOTT.

that is to say the said common or down called Houghton Down, in which &c., at the said time when &c., lay, and, from time immemorial had lain and still did lie contiguous and next adjoining to a certain other common or down in the parish of Bury, in the county of Sussex, that is to say, a certain common or down called Bury Hill Down, containing divers, to wit, five hundred acres of land, and had never been separated or divided from the last-mentioned common or down in the parish of Bury, that is to say, from the said common or down called Bury Hill Down, by any inclosure, hedge, or fence whatsoever sufficient to prevent cattle from time to time feeding and depasturing on the said common or down in the said parish of Bury, that is to say, the common or down called Bury Hill Down, from erring and escaping therefrom into the said common or down in the said parish of Houghton, that is to say, the common or down called Houghton Down, in which &c.; and that the said cattle from time to time during all that time duly put on the said common or down in the said parish of Bury, that is to say, the said common or down called Bury Hill Down, to feed on the grass there then growing, and to use the said common of pasture in, upon, and throughout the said last-mentioned common or down, from time immemorial had gone, escaped, and rambled, and had been used and accustomed to go, escape, and ramble therefrom into the said common or down in the said parish of Houghton, to wit, the said common or down called Houghton Down, in which &c., and to intermix there and feed with cattle from time to time feeding on the grass growing on the said last-mentioned common or down; and in like manner, the cattle from time to time during all that time duly put into the said common or down in the said parish of Houghton, to wit, the common or down called Houghton Down, in which &c., to feed on the grass there then growing, and to use the said common of pasture in, upon, and throughout the

1838.

HEATH v. ELLIOTT.

said common or down in the said parish of Houghton, to wit, the common or down called Houghton Down, from time immemorial had gone, escaped, and rambled, and had been used and accustomed to go, escape, and ramble therefrom into the said common or down in the said parish of Bury, to wit, the common or down called Bury Hill Down, and to intermix there and feed with cattle from time to time feeding on the grass growing on the said last-mentioned common or down: that the plaintiff, before and at the said time when &c., was and still is the occupier of a certain messuage, and of divers, to wit, fifty acres of land, with the appurtenances, situate and being in the parish of Bury aforesaid; and that the plaintiff and all others the occupiers for the time being of the said messuage and land now of the plaintiff, with the appurtenances, for the full period of thirty years next before the commencement of the suit and the said time when &c., without interruption, and of right, had had and been used and accustomed to have, and the plaintiff still without interruption and of right ought to have, for himself and themselves, his and their tenants and farmers, occupiers of the said messuage and land, with the appurtenances, common of pasture in, upon, and throughout the said common or down in the said parish of Bury, to wit, the said common or down called Bury Hill Down, for all his sheep levant and couchant in and upon the said land of the plaintiff, with the appurtenances, every year and at all times of the year, as to the said messuage and land with the appurtenances belonging and appertaining: that, the plaintiff being such occupier as aforesaid, just before the said time when &c. in the declaration mentioned, to wit, on the 15th of October, 1836, did put and cause to be put the said sheep in the declaration mentioned in and upon the said common or down in the parish of Bury, to wit, the said common or down called Bury Hill Down, being the plaintiff's commonable cattle

levant and couchant in and upon the said land of the plaintiff, to use the said common of pasture of the plaintiff, and to feed on the grass there growing: that, the said sheep so being put and being in the said common or down in the said parish of Bury, that is to say, the common or down called Bury Hill Down, for the purpose aforesaid, and the said common or down called Houghton Down, in which &c., so being and lying contiguous thereto, and not separated or divided therefrom by any inclosure, hedge, or fence whatsoever, the said cattle of the plaintiff afterwards, and just before the said time when &c., to wit, on the day and year aforesaid, of their own accord, and without the knowledge and consent of the plaintiff, went, escaped, and rambled from and out of the said common or down in the said parish of Bury, that is to say, the said common or down called Bury Hill Down, into the said common or down in the said parish of Houghton, to wit, the said common or down called Houghton Down, in which &c., and intermixed and fed with the cattle then there feeding on the grass, and remained and continued in the said common or down in the parish of Houghton, to wit, the common or down called Houghton Down, in which &c., on the occasion aforesaid, without the knowledge of the plaintiff, and there necessarily and unavoidably a little trod down and depastured the grass and herbage then there growing, and necessarily and unavoidably did damage there to the defendant as in the avowry mentioned; and this &c.

To this plea the defendant replied, that the cattle from time to time duly put on the said common or down called Bury Hill Down, to feed on the grass there then growing, and to use the said common of pasture in, upon, and throughout the last-mentioned common or down, had not from time immemorial gone, escaped, or rambled, nor had they been used or accustomed to go, escape, or ramble therefrom into the said common or down called Hough- Replication.

1838.

HEATH v. ELLIOTT.

ton-Down, in which &c., and to intermix there and feed with cattle from time to time feeding on the grass growing on the said last-mentioned common or down; and that the cattle from time to time duly put into the said common or down in the said parish of Houghton, to wit, the common or down called Houghton Down, in which, &c., to feed on the grass then there growing, and to use the said common of pasture in, upon, and throughout the said common or down in the said parish of Houghton, to wit, the common or down called Houghton Down, from time immemorial had not gone, escaped, or rambled, nor had they been used or accustomed to go, escape, or ramble therefrom into the said common or down in the said parish of Bury, to wit, the common or down called Bury Hill Down, and to intermix there and feed with cattle from time to time feeding on the grass growing on the last-mentioned common or down, modo et forma. Issue thereon.

Evidence.

At the trial before Littledale, J., at the last Assizes for the county of Sussex, the following facts appeared in evidence:—The plaintiff and defendant were farmers respectively occupying land in the adjoining parishes of Bury and Houghton; both having right of common on Bury Hill Down. The defendant had (under the Duke of Norfolk) the sole right of pasturage on Houghton Down, which was contiguous to Bury Hill Down, the two downs not being separated by any hedge or fence, but having merely posts at distant intervals to mark the boundaries of the two parishes. On the day mentioned in the count, the plaintiff's sheep having, in the absence of the shepherd who had the care of them, strayed from Bury Hill Down to Houghton Down, the defendant seized them.

On the part of the defendant, evidence was given that sheep straying from Bury Hill Down to Houghton Down had many times been driven back either by the shepherd attending them or by a shepherd having the care of the

1838.

HEATH v. ELLIOTT.

flock upon Houghton Down; and this was relied upon as shewing that the plaintiff's sheep had no right to be, nor any excuse for being, on Houghton Down.

The learned judge at first thought that the mere fact of the straying sheep being driven back from Houghton Down by the shepherd of the Bury Hill common was immaterial; but, in his summing up, he told the jury it was a material fact to shew that the plaintiff had no right of common pur cause de vicinage over Houghton Down—no person besides the defendant having right of pasturage on Houghton Down, a right which he exercised in respect of the ownership of the soil, in the same way as he would in an inclosed field; and he directed them to find for the defendant, reserving to the plaintiff leave to move that the verdict might be entered for him, for 4*l.* 4*s.*, if the court should be of opinion that the above fact did not affect the right. The jury thereupon found for the defendant, damages 6*s.*

Platt, in Michaelmas Term last, obtained a rule nisi accordingly.—He submitted that the fact of the driving back the sheep from Houghton Down to Bury Hill Down, was not inconsistent with the right claimed by the plaintiff, the right of driving back being merely correspondent with the right to inclose. Common pur cause de vicinage is thus described by Tindal, C. J., in the late case of *Wells* v. *Pearcey*, 1 New Cases, 566, 1 Scott, 426—"The nature of common pur cause de vicinage is clearly laid down and explained by Lord Coke in 4 Rep. 38. 6.; and by that book it appears to be, not any right of feeding on the adjoining common, but only 'an excuse of trespass by reason of the antient usage which the law allows, to avoid suits which would arise if actions should be brought for every such trespass when no separation or inclosure is between the commons.' 'And therefore,' it is added, 'one may inclose against the other; for cessante causâ

1838.

HEATH & ELLIOTT.

cessat effectus.' The same law is laid down by Mr. Justice Powell, in the case of *Broomfield* v. *Kirber*, 11 Mod. 72. 'This sort of common must be in nature of an escape, and so an excuse. For, a man cannot put in his cattle in common of vicinage originally; but they must escape. They may inclose one against the other, if they will be at the expense.' And it appears by a much more modern case (*Gullett* v. *Lopes*, 13 East, 348), that, in order to put an end to the common pur cause de vicinage, by inclosing, such inclosure must be complete; and that, if it is not so, the cattle may still stray from the one common to the other without impediment, and therefore the common pur cause de vicinage is not excluded." That doctrine is fully borne out by Co. Litt. 122. a., *Musgrave* v. *Cave*, Willes, 322, and the other authorities cited in *Wells* v. *Pearcey*.

Thesiger now shewed cause.—This was not a case of common pur cause de vicinage, and therefore the defendant had a right to treat the sheep in question as trespassing. To constitute common pur cause de vicinage, the right must ex vi termini exist between neighbouring *commons*, the respective cattle of which have, without interruption, time out of mind depastured upon both commons; and such right (or excuse) can only be terminated by inclosure: the cattle cannot be treated as trespassing, either by driving back or by impounding. It appeared from the evidence, that Houghton Down was the private property of the Duke of Norfolk, and that the defendant had under his Grace the sole right of pasture there. The defendant's cattle were turned on by him, not in the character of commoner, but as owner. The very foundation, therefore, of the plaintiff's excuse fails: unless the rights are reciprocal, common pur cause de vicinage cannot exist.

Platt and *Channell*, in support of the rule.—It is not competent to the defendants upon these pleadings to con-

1838.

HEATH v. ELLIOTT.

tend that Houghton Down was not an open common or down; it is so described both in the plea and in the replication: and the issue the parties went down to try was simply whether or not the cattle from time to time duly put into Bury Hill Down, to use the common of pasture there, had from time immemorial rambled thence into Houghton Down, and vice versâ. If the defendant had intended to rely upon the objection now set up, he should have replied it.

TINDAL, C. J.—This is not a case of common pur cause de vicinage. There is nothing either upon the face of the record, or in the evidence given at the trial, to shew that any person other than the defendant had a right of common or any other right on Houghton Down. The question is whether the nature of the defendant's enjoyment of Houghton Down was involved in the issue joined between the parties. It appears to me that it was. I think the attention of the jury was properly directed to whether the sheep put on the one common of right escaped and rambled into the other: and I think there was no evidence to enable them to find affirmatively for the plaintiff.

COLTMAN, J.—The plaintiff altogether failed to prove the excuse for the trespass set up by his plea in bar.

The rest of the court concurring—

Rule discharged.

MATSON and Three Others *v.* COOK.

Thursday, April 26th.

THIS was an action of trespass by the churchwardens and overseers of the poor of the parish of Battersea. The

The plaintiffs, churchwardens and overseers, took possession of waste land in the parish, and used it in the manner directed by the 1 & 2 Will. 4, c. 42, s. 2:—Held, a sufficient possession to entitle them to maintain trespass against a mere wrong-doer.

Quære, as to the mode of proving the consent of the lord of the manor and of the copyholders, under the act.

1838.

MATSON v. COOK.

declaration charged the defendant with breaking and entering a close of the plaintiffs as churchwardens and overseers, called Latchmore, and breaking down an embankment of the plaintiffs there erected, and removing the materials, and doing damage to the soil with horses and cows &c.

The defendant pleaded—first, not guilty, except &c.—secondly, to the whole declaration, that the close &c. were not the property of the plaintiffs, modo et formâ—thirdly, as to the trespasses excepted out of the first plea, that the defendant, before &c., was the occupier of a messuage and land at Battersea, and had for the full period of thirty years common of pasture, from the 13th May to the 4th September in every year, for one cow, to be tethered with an eight-yard tether, upon the said close called Latchmore, and because &c.—justifying the trespass.

The plaintiffs took issue on the first and second pleas, and traversed the right set up in the third.

The cause was tried before Lord Denman at the last Summer Assizes for the county of Surrey. It appeared in evidence that the close in question, Latchmore Common, was a field in the parish of Battersea, in which for a very long period certain persons had been accustomed to enjoy a right of common between the 13th May and the 4th September, in the manner alleged in the third plea; and that, after the 4th September, certain common fields were depastured by the commonable cattle of the same individuals, without being tethered: and that Latchmore Common had been so used down to the year 1835. Entries were read from the court rolls of the manor, shewing that for nearly two hundred years the inhabitants of Battersea, not being certificated persons, had exercised the right of depasturing a horse or a cow on Latchmore, and that certain penalties were enforced against parties turning on too great a number of cattle, or at improper times, or with too long a tether.

1838.

MATSON v. COOK.

By the 59 Geo. 3, c. 12, s. 12, after reciting, that, "by an act passed in the 43 Eliz., the churchwardens and overseers of the poor are directed to set to work certain persons therein described," and that, "by the laws then in force, sufficient powers were not given to the churchwardens and overseers to enable them to keep such persons fully and constantly employed"—it is enacted "that it shall be lawful for the churchwardens and overseers of the poor of any parish, with the consent of the inhabitants thereof in vestry assembled, to take into their hands any land or ground *which shall belong to such parish, or to the churchwardens and overseers of the poor of such parish, or to the poor thereof,* or to purchase or to hire and take on lease for and on account of the parish, any suitable portion or portions of land within or near to such parish, not exceeding twenty acres in the whole; and to employ and set to work in the cultivation of such land, on account of the parish, any such persons as by law they are directed to set to work, and to pay to such of the poor persons so employed as shall not be supported by the parish reasonable wages for their work." And by section 13, it is provided, "that, for the further promotion of industry amongst the poor, it shall be lawful for the churchwardens and overseers of the poor of any parish, with the consent of the inhabitants in vestry assembled, to let any portion and portions of such parish land as aforesaid, or of the land to be so purchased or taken on account of the parish, to any poor and industrious inhabitant of the parish, to be by him or her occupied and cultivated on his or her own account, and for his or her own benefit, at such reasonable rent and for such term as shall by the inhabitants in vestry be fixed and determined."

59 Geo. 3, c. 12, s. 12.

43 Eliz. c. 2, s. 1.

59 Geo. 3, c. 12, s. 13.

By 1 & 2 Will. 4, c. 42, s. 1, reciting the last-mentioned act, it is enacted, "that it shall and may be lawful for the churchwardens and overseers of the poor of any parish to hire and take on lease, for the employment of the poor

1 & 2 Will. 4, c. 42, s. 1.

1838.

MATSON v. COOK.

Section 2.

of such parish, any suitable portion or portions of land within or near to such parish, to an extent not exceeding fifty acres." And by the 2nd section, it is enacted, that, in order to extend the salutary and benevolent purposes of this act, it shall and may be lawful for the churchwardens and overseers of the poor of any parish to inclose from any waste or common land or ground lying in or near to such parish, *with the consent in writing of the lord of the manor and the major part in value of the persons having right of common thereupon, signified under their hands and seals,* any part or portion of such waste or common land not exceeding fifty acres, and to cultivate and improve the same for the use and benefit of such parish and the poor persons within the same, or to let any part or parts of the same to any poor and industrious inhabitant or inhabitants of such parish, to be by him or them occupied and cultivated on his or their own account."

Latchmore was not a waste or common belonging to the parish, but to the lord of the manor. In order, therefore, to prove that the field in question (which had been inclosed by the parochial authorities, part being let to poor persons, and other part cultivated for the use and sustentation of the paupers in the workhouse) had been duly inclosed pursuant to the 1 & 2 Will. 4, c. 42, s. 2, the plaintiffs proceeded to prove that they had obtained the consent of the lord of the manor, of the inhabitants in vestry assembled (*n*), and of the major part in value of the persons having right of common thereupon.

It appeared that Lord Spencer was lord of the manor; and a consent was produced with his lordship's name subscribed to it, and with a seal bearing the impression of his lordship's arms. The hand-writing of the earl was proved, but there was no evidence to shew how the seal

(*n*) Quære whether this was necessary. The 1 & 2 Will. 4, c. 42, says nothing about the consent of the vestry.

1838.

MATSON v. COOK.

got there. To prove the notice to convene a vestry, secondary evidence was offered. It appeared that the parish clerk, who had the original document in his possession, was living. The consent of the copyholders was thus obtained:—It was written on a sheet of paper having several seals attached to it, and sent round to obtain the signatures of the parties, and returned with certain names placed opposite the respective seals. There was no further evidence of sealing and delivery.

It was thereupon objected on the part of the defendant, that Latchmore was not such waste or common land as could be taken by the parochial authorities for the purposes mentioned in the statutes; and that, if it were, the plaintiffs had not so proceeded as to accomplish the law, they not having offered legal proof either of the convening of the vestry or of the consent of the lord and of the copyholders of the manor to the inclosure.

Lord Denman over-ruled these objections; and the jury, under his lordship's direction, found a verdict for the plaintiffs—damages one shilling.

Platt, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground of misdirection. [The question arose upon the second issue—the right set up by the defendant in his third plea, not having been proved.]—He submitted, that, inasmuch as the plaintiffs claimed a right to do something that they could not do without the aid of of the statute, it was incumbent on them to bring themselves strictly within it; that the 1 & 2 Will. 4, c. 42, s. 2, must be construed with all the strictness with which the court would construe a power; that the seal was an essential part of the consent, both in the case of the lord of the manor and in that of the commoners, and therefore should have been proved. Where a certificate under the statute 8 & 9 W. 3, c. 30 (which requires certificates to be under the hands and seals of the churchwardens and overseers,

1838.

MATSON v. COOK.

or the major part of them, or under the hands and seals of the overseers, where there are no churchwardens,) was signed by two churchwardens and one overseer, but bore two seals only, the court held that it was not a valid certificate. They said that it was the case of an execution of a power, and that in the execution of powers, all the circumstances required by the creators of the power, however unessential and otherwise unimportant, must be observed, and can only be satisfied by a strictly literal and precise performance.—*Rex* v. *Austrey*, E. T. 1817, Starkie on Evidence, 338, n., 1198,9, Phillips on Evidence, 510.—With respect to the notice to convene the vestry, he submitted that secondary evidence of it ought not to have been received.

Thesiger and *Channell* now shewed cause.—The defendant's right of common having been negatived by the jury, he was a mere wrong-doer, as against whom mere possession is sufficient. No matter how feeble the plaintiffs' title. It was enough for them to shew that they had, as churchwardens and overseers, taken possession of the land in question, and were exercising control over it.

Platt, in support of his rule.—If the court are prepared to hold that the mere taking possession of the land and exercising control over it, gives the plaintiffs, as churchwardens and overseers, a right to maintain an action of trespass, of course the question upon the statutes cannot arise, and the defendant is out of court.

TINDAL, C. J.—It appears that the plaintiffs have some how or other obtained possession of the close in question, have let portions of it, and have cultivated for the use of the parish paupers other part, without molestation either from the lord of the manor or from the copyholders. Upon the evidence, and the finding of the jury thereon, it appears

that the defendant is a mere stranger. As against him, therefore, the bare possession was enough to entitle the plaintiffs to maintain trespass.

1838.

MATSON v. COOK.

The rest of the court concurring—

Rule discharged.

In re BIRCH and BELL.

Thursday, April 26th.

The court allowed the acknowledgment of a married woman taken at Hamburgh, to be filed under the 3 & 4 Will. 4, c. 74, ss. 84, 85, with an affidavit verifying the certificate of the due taking thereof, in the German language, sworn before the proper officer there, but not *signed* by the deponent —it being sworn that by the practice of the country the affidavit is never signed by the deponent

WILDE, Serjeant, moved for leave to file the certificate of acknowledgment of a deed by two married women, and the affidavit verifying the same, under the 3 & 4 Will. 4, c. 74, ss. 84, 85.

The parties were resident at Hamburgh; the acknowledgment was taken there, and the certificate verified by an affidavit in the German language sworn before the Prætor, but not signed by the deponent. The affidavit in German (with an English translation) was produced signed by the functionary before whom it was sworn, and certified by a notary public. The same affidavit was also sworn before the English consul at Hamburgh.

Wilde produced an affidavit of a person who had been sent to Hamburgh to make inquiries upon the subject, and who deposed that he had inquired of notaries and magistrates as to the mode of swearing affidavits at Hamburgh, and had been informed by them that the affidavit in question had been sworn before the proper person; that oaths were never administered there in the English language or in "the English form."

TINDAL, C. J.—The only thing wanting, is, an affidavit, that, according to the practice at Hamburgh, the deponent does not *sign* the affidavit. There can be no difficulty in procuring an affidavit to that effect from some merchant here: or the party who made the affidavit that

1838.

In re BIRCH.

has been produced may possibly set the matter right by explaining what he means by "the English form." Upon the production of such an affidavit, the documents may be filed. We must be satisfied that the oath has been administered according to the proper form of the place where it is taken. The German affidavit will be the proper one to file: the translation need not be filed.

A proper affidavit having on a subsequent day been produced, the application was acceded to.

Friday, Jan. 27th.

In an action by husband and wife for an assault on the latter, the venue was originally laid in Middlesex, but had been changed at the defendants' instance to Yorkshire. The court refused, upon a suggestion, that, since the commencement of the action, the husband had been called to the bar, to restore the venue to Middlesex.

NEWTON and Wife *v.* HARLAND and Another.

THIS was action for assaulting the wife of the plaintiff, turning her out of certain apartments, and irregularly distraining the plaintiff's goods. The cause was tried before Parke, B., at the last Summer Assizes for the West Riding of Yorkshire, when a verdict was, under the direction of the learned Baron, found for the defendants. A rule for a new trial was made absolute on a former day in this term. The venue, which was originally laid in Middlesex, had been, at the defendants' instance, changed to Yorkshire, where the alleged assault was committed. Mr. Newton having since been called to the bar—

W. H. Watson, on that ground, moved for a rule calling upon the defendants to shew cause why the venue should not be restored to Westminster. [*Tindal*, C. J.—There is this difficulty—If the application be successful, the defendants will suffer a prejudice from the voluntary act of the defendant: and there is this further difficulty—that the action is the wife's action, the husband being joined only for conformity.] If the parties were reversed, and the present plaintiff had been defendant in an action for a debt contracted by the wife dum sola, he would not

1838.

NEWTON v. HARLAND.

be entitled to the privilege—*Robarts* v. *Mason and Wife*, 1 Taunt. 254. Here the husband is the party substantially injured. The cases as to the privilege of attornies in the books of Practice, are all cases of defendants; but, if the privilege be, as is said, given for the benefit of their clients, the reason of the thing holds as well the one way as the other.

TINDAL, C. J.—It seems to me that the principle is precisely the same whether in the case of plaintiffs or defendants. The cases are numerous where the attorney is trustee, or where the husband is joined for conformity. But I think the plaintiff here is not entitled to the privilege contended for.

The rest of the court concurring—

Rule refused.

MALINS *v.* FREEMAN.

Friday, April 27th.

THIS was an action for the non-completion of a contract of sale by auction.

The first count of the declaration stated that the plaintiff, on the 8th May, 1834, caused to be put up for sale by public auction a certain plot of land and premises, situate in the parish of Woodford, in the county of Essex, subject to the following amongst other conditions of sale—that the purchaser should pay down immediately a deposit of 20*l.* per cent. in part of the purchase-money, together with a moiety of the excise-duty of seven pence in the pound, and sign an agreement for the payment of the remainder of the purchase-money, with the amount of the timber, fixtures, &c., on or before the 31st of August, 1834; that the purchaser should have a conveyance of the said premises, at his own expense, properly executed by the vendor, upon payment of the remainder of the purchase-money as aforesaid, when he should be entitled to possession of the said premises; that, if the purchaser

By the 17th Geo. 3, c. 50, s. 8, the vendor at an auction is impowered to make it a condition of sale that the purchaser shall pay the auction-duty in addition to the purchase-money; and it is declared, that, upon his neglect or refusal to pay the same, the bidding "shall be null and void to all intents and purposes:" Held, that the contract is not, by reason of such neglect or refusal, absolutely *void*, but *voidable* only, at the option of the vendor.

1838.

MALINS v. FREEMAN.

should neglect or fail to comply with the said conditions, the deposit-money should be forfeited, the vendor should be at liberty to re-sell the said premises by public or private sale, and the deficiency, if any, by such sale, together with all charges attending the same, should be made good by the defaulter at the then present sale, and be recoverable as and for liquidated damages, and without the necessity of a conveyance being first tendered to such defaulter: that the defendant, upon such putting up the said premises for sale as aforesaid, then was the highest bidder, and was then declared to be, and then became and was the purchaser of the said premises at and for a certain sum of money, to wit, the sum of 1400*l.*, subject to the said conditions: and, in consideration of the premises, and that the plaintiff had then promised the defendant to perform the said conditions on his the said plaintiff's part and behalf as such vendor, the defendant then promised the plaintiff to perform the said conditions on his, the defendant's, part as such purchaser as aforesaid.

Fourth plea.

To this declaration the defendant pleaded, amongst other pleas, fourthly—that it was a condition of the said contract of sale in the said first count mentioned, that a moiety of the excise-duty or pound-rate granted by the act of parliament in such case made and provided, should be paid by the purchaser over and above the price bidden at such sale by auction; that the said moiety of the excise-duty or pound-rate was not nor was any part thereof paid by him at the time of the sale (although payment thereof was then demanded by the auctioneer of the defendant), or at any time since, but the same remained wholly due and unpaid on his the defendant's part, contrary to the statute in such case made and provided; whereby and by force of the said statute, the said bidding and sale became and was and still is wholly void—verification.

To this plea the plaintiff demurred generally, and the defendant joined in demurrer.

1838.

Mellish v. Freeman.

R. V. Richards, in support of the demurrer, was stopped by the court, who called on—

W. H. Watson, to support the plea.—The question is whether or not a bidding at an auction is conclusive on the party, or whether the bidder has not always a locus pœnitentiæ. The point is suggested by Sir E. Sugden, in his treatise upon the law of Vendor and Purchaser, 9th edit. p. 44, n. "Although," says he, "the duty is by the acts imposed on the vendor, yet he is not restrained from making it a condition of sale, that the duty, or any certain portion thereof, shall be paid by the purchaser over and above the price bidden at the sale by action; and, in such case, the auctioneer is required to demand payment of the duty from the purchaser, or such portion thereof as is payable by him under the condition; and, upon neglect or refusal to pay the same, such bidding is declared by the act to be null and void to all intents and purposes." The words of the statute (17 Geo. 3, c. 50, s. 8) are express:—"That nothing herein contained shall extend or be construed to restrain any seller by auction or person acting as auctioneer at any sales by way of auction, from making it a condition of sale, that the pound-rate granted by this act, or any certain portion thereof, shall be paid by the purchaser over and above the price bidden at such sale by auction; and, in such case, the person so acting as auctioneer is hereby authorized and required to demand payment of the said duty from such purchaser or purchasers, or such portion thereof as expressed in such condition or agreement, and *upon neglect or refusal to pay the same, such bidding shall be null and void to all intents and purposes.*" In *Phillips* v. *Bistolli*, 3 D. & R. 822, 2 B. & C. 511, where a person attending a public auction room, bid for a lot, and after having been declared the highest bidder, the article was immediately delivered to him, but in a

1838.
MALINS
v.
FREEMAN.

the successor of the dean is not successor to the whole corporation who made the lease, but only the principal member of it; yet because the whole corporation never dies, such lease, by construction, shall be void after the death of the dean, who is the principal member of the corporation, and his successor, with the chapter, shall avoid it. So, in the principal case, although it be provided by the statute of 11 Hen. 7 that the discontinuance, alienation, warranty, and recovery shall be void; yet they are not void presently, but are to be made void by such persons to whom, after the death of the woman, the interest, title, or inheritance appertains. And with this resolution agrees 27 H. 8, 23 b., on this very statute of 11 Hen. 7." Nor can I in principle distinguish this case from *Doe* d. *Bryan* v. *Bancks*, 4 B. & Ald. 401. There, a lease of coal-mines reserved a royalty rent for every ton of coal raised, and contained a proviso that the lease should be void to all intents and purposes, if the tenant should cease working at any time two years. After the working had ceased more than two years, the lessor received rent: and it was held that a tenancy from year to year was not thereby created; for, the lease was not absolutely void by the cesser to work, but voidable only at the option of the lessor. "The true construction," says Bayley, J., "of the proviso in this lease, 'that it shall be null and void to all intents and purposes upon a cesser of two years,' is, that it shall be voidable only at the option of the lessor, and that it does not lie in the mouth of the lessee, who has been guilty of a wrongful act in omitting to work in pursuance of his covenant, to avail himself of that wrongful act, and to insist that thereby the lease has become void to all intents and purposes. By the express provisions of the 13 Eliz. c. 10, certain ecclesiastical leases are made void to all intents, constructions, and purposes; yet it has been frequently held that such leases are good during the life of the person by whom they are made. I think,

1838.

MALINS v. FREEMAN.

therefore, that the fair construction of this lease is, that it is void only at the option of the lessor." A contrary construction would enable the lessee, or, in this case, the purchaser, to avail himself of a proviso that was introduced for the benefit of the other party, in order to defeat and destroy his own contract.

PARK, J.—I am of the same opinion. *Doe* d. *Bryan* v. *Bancks* seems to me to decide the case.

BOSANQUET, J.—There are many authorities to shew that the words "null and void" may mean "voidable," unless there be something in the context to prevent their receiving that interpretation. This proviso was clearly intended for the benefit of the vendor. It would be manifestly contrary to reason and justice so to construe it as to enable the purchaser to avail himself of his own default to avoid his contract.

COLTMAN, J.—It would be so clearly contrary to justice so to construe the proviso in question as to enable the purchaser to take advantage of his own default in order to defeat the contract he has entered into, that the court would not be disposed to yield to the argument unless the context manifestly shewed that the construction contended for was consistent with the intention of the legislature. By the statute 14 Eliz. c. 8, a recovery suffered by tenant for life, without the assent of the remainder-man, is declared to be "clearly and utterly void and of none effect;" and yet it has been held that a recovery suffered by tenant for life, vouching the remainder-man in tail, who vouches the common vouchee, to the use of the tenant in tail and his heirs, will bar the reversion in fee; the object of the statute being to protect the remainder-man against the tenant for life. Many other authorities to the same effect might if necessary be cited.

Judgment for the plaintiff.

1388.

Friday, April 27th.

HOCKEN v. BROWN and Another.

TRESPASS for seizing the plaintiff's goods on the 19th June, 1836, under colour of a writ of fi. fa.

The defendants pleaded that they had recovered against the plaintiff and one Charles Vincent Gaveron a debt of 2,400*l.*, and 60*s.* costs, and sued out the fi. fa. thereon—justifying the seizure.

Replication—that, by an indenture of the 16th February, 1835, made between Charles Vincent Gaveron of the first part, the defendants of the second part, and one W. E., a trustee of the defendants, of the third part, an annuity of 135*l.* per annum was granted by Gaveron to the defendants, to be paid during the lives of the defendants, the payment whereof was secured by a joint and several warrant of attorney executed by Gaveron and the plaintiff as his surety; that judgment was entered up on the said warrant of attorney against Gaveron and the plaintiff on the 26th February, 1835, and that on that judgment the fi. fa. in the plea mentioned was sued out; that, on &c., a quarter's annuity was in arrear; that, after the making of the indenture, and after the recovery by the defendants, and before the annuity so became in arrear, to wit, on the 26th September, 1835, Gaveron was a prisoner for debt confined in the Fleet Prison at the suit of one Richardson, and others, that he applied by petition to the court for the relief of insolvent debtors to be discharged, and that, on the said petition coming on to be heard by the said court, he (Gaveron) was discharged, and was held entitled to the benefit of the act; and that, by

By the 7 Geo. 4, c. 57, s. 51, it is enacted that the discharge of any prisoner under the act "shall and may extend to any sum and sums of money which shall be payable, by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever; and that every person and persons who would be a creditor or creditors of such prisoner for such sum or sums of money, if the same were presently due, shall be admissible as a creditor or creditors of such prisoner for the value of such sum or sums of money so payable as aforesaid, which value the said court shall ascertain, &c. &c.; and such creditor or creditors shall be entitled in respect of such value to the benefit of all the provisions made for creditors by the act, without prejudice nevertheless to the respective securities of such creditor or creditors, excepting as respects such prisoner's discharge under the act:"—Held, that the discharge of the grantor of an annuity under the act, does not release one who had as surety for the grantor executed a joint and several warrant of attorney to secure the instalments of the annuity.

And, semble, that the grantor is not discharged from liability to his surety for payments made by the latter in respect of the annuity subsequently to the grantor's discharge under the act.

force of the said discharge, the plaintiff was released from his liability to the payment of the money to the defendants in respect of the said annuity.

To this replication, the defendants demurred specially, assigning for causes—that, although the plaintiff had admitted the execution by him of a certain joint and several warrant of attorney, whereupon the judgment, execution, and seizure by the defendants in their plea alleged in justification of the trespasses complained of by the plaintiff were admitted to have proceeded, yet that he had in no way avoided the effect of the said warrant of attorney, or of the said judgment and other proceedings so admitted to have been taken upon and by virtue of the said warrant of attorney; that the replication attempted to put in issue, to be tried by the country, a mere inference and question of law, that is, whether, on account of Gaveron having been discharged as an insolvent from his liability to be sued on a certain joint and several instrument or security in the declaration mentioned, and into which the plaintiff and Gaveron had jointly and severally entered, the plaintiff was also thereby discharged from such his separate liability.

The plaintiff joined in demurrer.

Channell, in support of the demurrer.—The plaintiff claims to be relieved from liability by reason of the discharge of Gaveron, the principal debtor, under the insolvent debtors act. Where a creditor by *his own act* releases a principal debtor, the surety is thereby also discharged: but it is otherwise where the discharge of the principal is under the operation of a statute. There is nothing in the language of the 7 Geo. 4, c. 57, to warrant the conclusion that the discharge of the principal in a case like this, releases the surety: the 51st section rather tends to negative that inference: it enacts—"that the discharge of any such prisoner so adjudicated as aforesaid shall and may extend to any sum and sums of money

1838.

HOCKEN v. BROWN.

which shall be payable by way of annuity or otherwise at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever; and that every person and persons who would be a creditor or creditors of such prisoner for such sum or sums of money if the same were presently due, shall be admissible as a creditor or creditors of such prisoner for the value of such sum or sums of money so payable as aforesaid, which value the said court shall, upon application at any time made in that behalf, ascertain, regard being had to the original price given for such sum or sums of money, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the time of filing such prisoner's petition; and such creditor or creditors shall be entitled in respect of such value to the benefit of all the provisions made for creditors by this act, *without prejudice nevertheless to the respective securities of such creditor or creditors*, excepting as respects such prisoner's discharge under this act."(*p*) In *Cowley* v. *Bussell*, 4 Taunt. 460, it was held that the grantor of an annuity discharged out of custody under the insolvent act 51 Geo. 3, c. 125 (*q*), was discharged both

(*p*) The clause is re-enacted in the same words in the 1 & 2 Vict. c. 110, s. 80.

(*q*) The 16th section of which provides "that all and every creditor and creditors of any debtor who shall be discharged by virtue of that act for any sum or sums of money payable by way of annuity or otherwise at any future time or times, by virtue of any bond, covenants, or other securities of any nature whatever, may be and shall be entitled to be admitted creditor or creditors, and shall be entitled to receive a dividend or dividends of the estate of such debtor, in such manner and upon such terms and conditions as such creditor or creditors would have been entitled unto by the laws now in force, if such debtor had become bankrupt, *and without prejudice in future to their respective securities*, otherwise than the same would have been affected by a proof made in respect thereof by the creditor under a commission of bankrupt and a certificate obtained by the bankrupt under such commission." Chambre, J., in commenting upon this clause in Cowley v. Bussell, says—"I think, upon the whole, the intention of the statute is, to extinguish the debt as to the principal creditor [debtor?], al-

1838.

HOCKEN v. BROWN.

as to his person and property from all future payments of the annuity; but that the act was no discharge of his sureties, or of specific securities. And Sir James Mansfield said: "The words 'without prejudice to their respective securities' are very obscure, but they may mean, that, if a man has any specific security on land, it should not be taken from him, or, if he has sureties, that they should not be discharged; that only the person and property of the debtor are to be discharged in this case, in like manner as the person and property of the debtor only are discharged under a commission of bankruptcy." In *Page* v. *Bussell*, 2 M. & Sel. 551, the court of King's Bench put the same construction upon the 51 Geo. 3, c. 125, s. 16, and held that a person discharged under that act was liable to his surety for the arrears of an annuity due since his discharge, which the surety had been obliged to pay. And in *Powell* v. *Eason*, 8 Bing. 23, 1 M. & Scott, 68, it was held that one discharged under the insolvent debtors act, 7 Geo. 4, c. 57, was not exonerated from the claim of a surety on a promissory note which became due before the insolvent presented his petition, but which the surety was not called on by the creditor to pay until after the discharge of the principal. Tindal, C. J., there points out the distinction between the statute in question and the bankrupt laws. He says: "The 10th section of the 7 Geo. 4, c. 57, authorizes the prisoner to petition the insolvent debtors court to be discharged from custody, and to have future liberty of his person *against the demands for which the prisoner shall be then in cus-*

though that intention is most imperfectly expressed, and it is not at all happily elucidated by the reference to the numerous bankrupt laws. There is no provision made by this act for ascertaining the value of the annuities, as there is in the bankruptcy statutes; and I cannot venture to say that the commissioners are to take on them at their own risk to set a value on the annuities; nor could they adopt the calculations to be made ex parte by any eminent calculator, without rendering themselves subject to incessant litigation."

1838.

HOCKEN v. BROWN.

tody, and against the demands of all other persons who shall be or claim to be creditors of such prisoner *at the time of presenting such petition.* And the 46th section enacts 'that it shall be lawful for the court to adjudge the prisoner to be discharged from custody as to the several debts and sums of money due or claimed to be due *at the time of filing such prisoner's petition.* Was, then, the plaintiff a creditor of the defendant at the time of presenting or filing his petition? The plaintiff was then only a surety for the payment of a promissory note due from the defendant to Mary Bell. There was no debt as between the plaintiff and the defendant, and consequently the plaintiff was not a creditor of the defendant at the time of his discharge, and therefore he does not fall within the words or meaning of either of those clauses of the act. In confirmation of this view of the subject, we find, that, in the last act for the amendment of the laws relating to bankrupts (6 Geo. 4, c. 16), which was passed in the year preceding that in which the statute in question was passed, it was found necessary to introduce a clause to relieve bankrupts from the claims of sureties and other persons who were liable for the bankrupt's debts; and by the 52nd section it is enacted, 'that any person who at the issuing of the commission shall be surety or liable for any debt of the bankrupt, if he shall have paid the debt, or any part thereof in discharge of the whole debt, if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the commission which such creditor possessed or would be entitled to in respect of such proof; or, if such creditor shall not have proved under the commission, such surety shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors accordingly.' But there is no such auxilliary clause in

1838.

HOCKEN v. BROWN.

the act now before us, from which we may infer that the legislature did not intend a surety for a bankrupt to stand in the same situation as a surety for a person who became insolvent, or that the same relief should be granted to the latter as to the former." Besides, here there is no allegation that the debt in question was inserted in the insolvent's schedule. [*Tindal*, C. J.—If the fact were so, was it not incumbent on the defendants to aver the omission?] It was for the plaintiff, who seeks to avail himself of the discharge, to substantiate it.

Hoggins, in support of the replication.—The real question is, whether or not the plaintiff as surety is released by the discharge under the insolvent debtors act of the principal annuity debtor. The question is one of considerable importance; and this is the first time it has been presented to a court of law since the passing of the 7 Geo. 4, c. 57. The consequence of holding the surety not to be discharged, would be to render the principal still liable in a circuitous manner, notwithstanding he is expressly relieved by the statute. *Cowley* v. *Bussell* and *Page* v. *Bussell* turned upon the 51 Geo. 3, c. 125, s. 16, the language of which is totally different from that of the 51st section of the now existing statute. At that time bankrupts and insolvents were precisely upon the same footing in this respect: Bayley, J., in *Page* v. *Bussell*, says: "Even in the case of a bankrupt, if the annuity creditor does not come in and prove, but, disregarding the bankruptcy, sues the surety, the surety cannot insist on the certificate, and, if he cannot, may not the surety afterwards resort to the bankrupt?" As regards the case of bankruptcy, the question is now at rest: it was provided for by the 6 Geo. 4, c. 16, s. 52, as is observed by Tindal, C. J., in *Powell* v. *Eason*, though there the decision turned upon the 10th and 14th sections of the 7 Geo. 4, c. 57. The 51st section was evidently intended by the legislature to afford the

1838.

HOCKEN v. BROWN.

same relief in the case of insolvency. By that clause the principal annuity debtor is absolutely discharged. If the principal be discharged, the surety must be discharged also, otherwise the principal never would be free; for, each successive quarterly payment on account of the annuity by the surety, would constitute a separate and distinct and new debt. It clearly must have been the intention of the legislature to place bankrupts and insolvents and their sureties upon the same footing. It cannot be supposed that they meant, that, in the case of insolvency, the annuity creditor should claim against the estate for the value of the annuity, and also resort to the surety for the annual payments. [*Coltman*, J.—Your argument would place the surety of an *insolvent* grantor in a better situation than the surety of a *bankrupt* grantor.—*Tindal*, C. J.—If you are right, a creditor is no better off for having a surety. A court of equity would hold the balance of justice between the parties, as under the old bankrupt laws.] The intention of the act was, to discharge the principal debtor, and to compel the creditor to resort to the estate: and the only way of carrying that intention into effect, is, by holding the sureties discharged also.

Channell, in reply, was stopped by the court.

TINDAL, C. J.—It appears to me that this case may be determined by referring only to the concluding words of the 51st section of the 7 Geo. 4, c. 57. The first part of the section provides that the discharge of any prisoner "shall and may extend to any sum and sums of money which shall be payable by way of annuity or otherwise at any future time or times by virtue of any bond, covenant, or other securities of any nature whatsoever; and that every person and persons who would be a creditor or creditors of such prisoner for such sum or sums of money if the same were presently due, shall be admissible as a cre-

1838.

HOCKEN v. BROWN.

ditor or creditors of such prisoner for the value of such sum or sums of money so payable as aforesaid, which value the said court shall, upon application at any time made in that behalf, ascertain, regard being had to the original price given for such sum or sums of money, deducting such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the time of filing such prisoner's petition; and such creditor or creditors shall be entitled in respect of such value to the benefit of all the provisions made for creditors by the act." It is said that the defendants have not availed themselves of the power thus given to them by this clause. It may be that they have lost the remedy the statute gives them. But with that we have nothing to do. The clause then proceeds to declare that the creditor's right to avail himself of the benefit of all the provisions made for creditors by the act, shall be "without prejudice to the respective securities of such creditor or creditors, excepting as respects such prisoner's discharge under the act." In what situation does this plaintiff stand? He has given a security by his own warrant of attorney for the due payment of the annuity by the grantor. And the moment the grantees attempt to put it in force, they are met by the objection that the original debtor has been discharged under the act. It seems to me that the section I have above referred to disposes of the objection. The exception at the end of the clause—"excepting as respects such prisoner's discharge under the act"—is, as it seems to me, limited to any step that might affect the principal's discharge under the act. Here the principal has already been discharged. It has been urged, on behalf of the plaintiff, that, if we hold the surety not to be relieved from his responsibility, the principal will still be liable in a circuitous manner, there being no express provision in the insolvent debtors act, as there is in the 6 Geo. 4, c. 16, for preventing the surety from afterwards resorting to the

1838.

HOCKEN v. BROWN.

principal, when he shall have been called upon to make good the future accruing quarterly payments. It may be so. But, when we see that there is an express provision in the 6 Geo. 4, c. 16, to enable the surety to put himself in the place of the annuity-creditor and receive dividends in respect of the proof made by him, and that the statute now in question, though passed in the very next session, contains no provision of the sort, we must suppose the omission to have been not unintentional, and cannot supply a machinery which the legislature has not thought fit to give. I therefore think the defendants are entitled to judgment.

PARK, J.—I am of the same opinion. Until the passing of the 6 Geo. 4, c. 16, that which is now complained of as a grievous hardship upon a grantor of an annuity who has taken the benefit of the insolvent debtors act, existed equally in the case of one who had become a bankrupt. In the case of *Freeman* v. *Burgess*, 4 Bing. 416, 1 M. & P. 91, which came before this court in the year 1827, this question was very fully gone into. There, the grantor of an annuity discharged under the insolvent debtors act 1 Geo. 4, c. 119, was held liable to be arrested by his surety for arrears which became due subsequently to his discharge, and which the surety was obliged to pay; although the grantee had proved the value of the annuity, which was ascertained by the commissioners in pursuance of the 10th section of the statute, and the surety had received a dividend. This was thought to be a case of great hardship; and therefore, I presume, the clause now presented to us for interpretation was introduced, expressly declaring that the principal debtor shall be absolutely discharged. Had it been intended that the surety also should be relieved from responsibility, the clause would no doubt have gone on in so many words to declare that such discharge should extend to the surety as well as to the principal. Had it

done so, I should have thought it a very unjust law. The very object of having a surety at all, is, that there may be some responsible party to fall back upon when the principal debtor fails. The concluding words of the section—" without prejudice to the respective securities of such creditor or creditors "—seem to me to put the matter beyond all doubt. Upon general principles of policy, and upon the express language of the statute, I am of opinion that our judgment should be for the defendants.

BOSANQUET, J.—I am of the same opinion. The annuity creditor has acquired by the act of the plaintiff a vested right to sue him for the amount of the annual payments, on the default of his principal, the grantor; and of this vested right he is not to be deprived but by the express and unequivocal words of an act of parliament. In the year 1825, the 6 Geo. 4, c. 16, was passed, containing specific provisions on the subject. By that act (s. 52), the annuity creditor is enabled to get the annuity valued, and the surety to discharge himself by paying the creditor the amount of such valuation, and stand in his place in respect of dividends. If the surety omit to avail himself of this power, he will continue liable for the arrears of the annuity as they fall due. In the following year, the statute relating to insolvents passed, the 51st section of which provides for the discharge of the principal debtor, but makes no provision whatever in favour of the surety. In the absence of an express provision upon the subject, we should not be justified in holding that the creditor cannot maintain an action against the surety. For what purpose does a man require security, but to guard against the risk of the principal debtor becoming bankrupt or insolvent? It appears to me that there is nothing in the 51st section to deprive the creditor of his right to sue the surety: on the contrary, I think his right is expressly reserved by the concluding words of that section.

1838.

HOCKEN v. BROWN.

COLTMAN, J.—If we were at liberty to speculate upon the subject, we might be inclined to believe that the legislature did probably intend to place bankrupts and insolvents, grantors of annuities, and their sureties, upon the same footing, and that this intention was frustrated by an accidental omission or oversight. But we are not at liberty so to speculate: we must take the act as we find it; although the benefit that was contemplated to the insolvent may be thereby in some degree impaired. It is impossible, however, to conceive that the legislature could have intended to place the surety of a grantor who should take the benefit of the insolvent act in a better situation than the surety of one against whom a fiat in bankruptcy should issue. The 51st section says that the insolvent's discharge shall be "without prejudice to the respective securities of the creditor or creditors, excepting as respects such prisoner's discharge under the act." What does the prisoner's discharge under the act mean? It means a personal discharge from all debts enumerated in his schedule. Here the insolvent has had his discharge. It appears to me that the most rational construction of the clause in question will be, to confine the latter part of it to the direct discharge of the insolvent himself, and to hold that the case of the surety is left as it stood at common law.

Judgment for the defendant.

ALSAGER and Others, Assignees of DRURY, a Bankrupt, *v.* SPALDING and Another.

Saturday, April 28th.

One D. proposed to make a composition with his creditors, paying them 8*s.* in the pound on their respective debts, they releasing him from all claims and demands in respect of such debts, and engaging to give up all securities held by them. Certain creditors of D. refused to sign the deed unless the defendants signed it: the defendants at first refused to do so, but afterwards consented on D. assigning to them as a security for the residue of their debt a policy of assurance for 200*l.* on the life of his mother, which he had previously placed in their hands:—Held, that the assignees of D., against whom a fiat afterwards issued, might recover from the defendants in an action for money had and received, the money obtained by them from the insurance office on the falling of the life—the assignment of the policy being a fraud on the rest of the creditors—although the 8*s.* in the pound was not entirely paid.

THIS was an action of assumpsit for money had and received, brought by the plaintiffs, assignees of the estate

1838.

ALSAGER v. SPALDING.

and effects of one John Drury, a bankrupt, to recover the sum of 221*l.* 5*s.*; the first count of the declaration alleging the money to have been received by the defendants to the use of Drury before his bankruptcy; the second, to the use of the plaintiffs as assignees. The defendants pleaded non assumpsit.

The cause was tried before Tindal, C. J., at the sittings in London after last Michaelmas Term. The facts that appeared in evidence were as follow:—Towards the close of 1834, Drury, being in embarrassed circumstances, and indebted to the defendants in the sum of 99*l.* 17*s.* for goods sold and delivered, in part payment for which they held his note for 20*l.*, and being also indebted to various other persons, proposed to enter into a composition for the payment of 8*s.* in the pound upon the amount of their several debts—the creditors undertaking, on receipt of the composition, to release and discharge Drury from all claims in respect of the debts set opposite to their respective signatures, and also to cancel all bills, notes, and other securities held by them.

A policy of assurance for 200*l.* effected by Drury on the life of his mother had been placed by the latter in the defendants' hands by way of security for their debt. Caslon & Livermore, creditors of Drury, refusing to sign the composition deed unless it was first signed by the defendants, the latter agreed to sign it upon having the policy assigned to them, which was accordingly done. The alleged consideration for the assignment was 40*l.* 4*s.* 6*d.*, the sum at which the policy was valued at the office. On signing the deed, the defendants gave up the note for 20*l.* In the month of September, 1835, the defendants paid to the insurance office 15*l.* 17*s.* 6*d.*, for the annual premium due thereon. In August of the following year, Drury's mother died, and the defendants received on the policy 237*l.* 12*s.* 6*d.* The instalments due on the composition deed were not all paid; the defendants received thereon

1838.

ALSAGER v. SPALDING.

only 29*l.* 5*s.* 6*d.*, instead of 39*l.* 19*s.* Drury became bankrupt in May, 1837. The plaintiffs, as his assignees, brought this action to recover the sum so received from the insurance office, less the 15*l.* 17*s.* 6*d.* paid by the defendants for the annual premium, contending that the assignment of the policy by Drury to the defendants to induce them to sign the deed, was, in point of law, a fraud upon the rest of the creditors.

A verdict was found for the plaintiffs.

Talfourd, Serjeant, in the last term, obtained a rule nisi to enter a nonsuit, on the grounds that, the defendants having already an equitable mortgage on the policy, the assignment was not a fraud upon the other creditors; and that the composition deed being conditional only on payment of the instalments, the creditors were, on Drury's failure to pay them, remitted to their original rights. He cited and relied on *Ward* v. *Bird*, 5 C. & P. 229, and *Oughton* v. *Trotter*, 2 N. & M. 71. In the former, A., being a creditor of B., had executed a composition deed, in which it was stipulated that the debt should be paid at 6*s.* in the pound, by promissory notes: after executing this deed, A. obtained payment from B. in full: and it was held that B. could not recover back the difference between the full amount and 6*s.* in the pound, without proving that the composition notes had been paid, or giving some evidence that would be equivalent to such proof. And in the latter, where, at a meeting of creditors of A., it was agreed that a composition of 6*s.* in the pound should be accepted, and that promissory notes for the amount "should be given within fourteen days, the creditors assenting thereto within that time," and A. was sued for a debt due to one of the parties to the agreement, it was held, that, unless A. could shew a delivery or tender of the notes, he was liable for the whole debt.

1838.

ALSAGER v. SPALDING.

Wilde, Serjeant, and *Knowles*, on a former day, shewed cause.—*Ward* v. *Bird* and *Oughton* v. *Trotter* are not applicable to the present case; in the one, the agreement was abandoned, and the report of the other is wholly unintelligible. In a case of this sort, if one creditor, in order to secure to himself an advantage beyond the rest of the creditors, receive from the debtor a security by bill or otherwise for a sum beyond the amount of the composition, he is in contemplation of law guilty of a fraud, and cannot avail himself of the security thus ceded to him, and is liable to refund any money he may have received under it—*Cockshott* v. *Bennett*, 2 T. R. 763; *Jackson* v. *Lomas*, 4 T. R. 166; *Leicester* v. *Rose*, 4 East, 372; *Stock* v. *Mawson*, 1 B. & P. 286; *Smith* v. *Bromley*, Doug. 696, n. Ashhurst, J., in *Cockshott* v. *Bennett*, says: "If this security [a note given to induce the plaintiff to sign a composition deed] be fraudulent, a court of law may avoid it as well as a court of equity; and in my apprehension it is a fraud on the rest of the creditors: for, they were induced to enter into this agreement on principles of humanity, in order to discharge the defendants from their incumbrances: and, if they had not thought that such would have been the effect, they would not probably have agreed to sign the deed, but each would have endeavoured to obtain payment of his whole debt. Therefore I think that this security is not merely voidable, but absolutely void. If it had been only voidable, the subsequent promise might have revived it: but, if void in its creation, no promise could set it up again. But here the note was void on the ground of fraud; and any subsequent promise must be nudum pactum; for, the debt was annihilated by the deed of composition, and the plaintiffs had agreed to take a smaller sum than their original debt." In *Smith* v. *Cuff*, 6 M. & S. 160, where the defendant, being a creditor of the plaintiff, entered into a composition deed with the other creditors to receive 10*s.* in the

1838.

ALSAGER v. SPALDING.

pound, under an agreement with the plaintiff that he would give the defendant his promissory notes for the remainder of the debt, which notes were accordingly given, and the composition was paid to the defendant, and he negotiated the promissory notes, the holder of one of which enforced payment from the plaintiff by action: it was held that the plaintiff might recover back the amount from the defendant in an action for money paid and had and received. Lord Ellenborough there said: "This is not a case of par delictum: it is oppression on one side, and submission on the other: it never can be predicated as par delictum when one holds the rod, and the other bows to it. There was an inequality of situation between these parties: one was creditor, the other debtor, who was driven to comply with the terms which the former chose to enforce. And is there any case where money having been obtained extorsively and by oppression, and in fraud of the party's own act as it regards the other creditors, it has been held that it may not be recovered back? On the contrary, I believe it has been uniformly decided that an action lies." That case and *Turner* v. *Hoole*, D. & R. N. P. C. 27, are precisely in point, and must govern this case. In *Turner* v. *Hoole*, a creditor had signed a composition deed in favour of his debtor, but afterwards induced the latter to give him bills for the full amount of his debt, dated the day before the composition deed, and, after receiving one instalment, sued the debtor upon the bills, and recovered the amount minus the instalment paid: and it was held that the debtor might maintain an action for money had and received against the creditor, to recover the difference between the amount of the composition and the full amount of the debt. The present is clearly a case of gross fraud as far as regards Messrs. Caslon & Livermore. They had refused to sign the deed unless the defendants signed it; and they had a right to expect perfect good faith in

1838.

ALSAGER v. SPALDING.

the transaction. It was fraudulent in the defendants to retain the securities, the deed stipulating that all securities should be given up.

The Court called upon *Talfourd,* Serjeant, to distinguish *Smith* v. *Cuff* and *Turner* v. *Hoole* from the present case; giving him time to look into them.

The learned Serjeant admitting that they could not fairly be distinguished, the rule for entering a nonsuit was discharged.

Rule discharged.

HOULDITCH and Another *v.* CAUTY.

Monday, April 30*th.*

In an action by indorsees against an indorser of a bill of exchange, the following letter was addressed by the plaintiffs to the defendant:—"Messrs. H. are surprised to hear that Mrs. G.'s bill was *returned to the holder unpaid.*" On the evening of the same day, the defendant called on the plaintiffs, expressed his surprise that the bill had not been paid, and promised to write to the *parties* in Edinburgh, and that he would see it paid, but made no objection to the sufficiency of the notice he had received. At the trial, it was left to the jury to say whether or not the letter and the conversation together amounted to a notice of dishonor. The jury having found for the plaintiffs, the court refused to disturb their verdict.

The defendant pleaded in bar a deed of release alleged to have been executed by the plaintiffs and other creditors of one Crokat, a prior indorser. The deed appeared to have been executed by the plaintiffs alone, and was in form a mere assignment by the plaintiffs to one Souter of the debt due to them from Crokat, putting Souter in their place with regard to the remedy against Crokat on the bill; the consideration for such assignment being 2*s.* 6*d.* in the pound on the amount of the debt:—Held, that this deed did not sustain the plea.

THIS was an action of assumpsit. In the first count the plaintiffs declared on a bill of exchange for 100*l.* drawn on the 9th February, 1832, by one Frederick Parsons, upon one Charles Chaplin, payable three months after date, and indorsed by Parsons to the defendant, and by the defendant to the plaintiffs.

To this count the defendant pleaded—first, that the bill therein mentioned was not presented to Chaplin on the day when it became due, modo et formâ—secondly, that the defendant did not have due notice of the dishonor of the bill, modo et formâ—thirdly, that, after the indorsement of the bill to the plaintiffs, and before the commencement of the suit, to wit, on the 9th February, 1832, in consideration that divers persons whose

1838.

HOULDITCH v. CAUTY.

names were to the defendant unknown, creditors of Chaplin, then had agreed and did agree among themselves and with the plaintiffs and Chaplin to give time to Chaplin to pay to them the said creditors the debts to them respectively due, to wit, that Chaplin should set apart a certain sum of money, to wit, the sum of 200*l.* annually out of his income and property, the plaintiffs agreed to receive rateably with the said other creditors of Chaplin payment of the said money in the said bill of exchange mentioned, and interest thereon, out of the said sum so set apart, in full satisfaction and discharge of the premises in the said first count mentioned; that it was further then agreed and a part of the agreement between the said creditors of Chaplin and the plaintiffs and Chaplin, that he should have time to pay the said money due in respect of the said bill in the first count mentioned, that is to say, until it should become due in respect of the said setting apart of the said annual sum by Chaplin in manner thereinbefore mentioned, without the knowledge or consent of the defendant, and thereby then released and discharged Chaplin from all liability upon the said bill of exchange, except as in this plea mentioned, without the knowledge or consent of the defendant; and that, according to the said agreement and time given, the plaintiffs would not be entitled to receive full payment of the said sum of money in the first count mentioned until a long time after the said bill had become due, to wit, twelve months afterwards—verification.

Second count.

The second count of the declaration was upon a bill of exchange for 850*l.* drawn on the 28th March, 1832, by one Anne Gib, upon W. H. Rainsford, payable three months after date, and indorsed by Anne Gib to William Crokat, by William Crokat to the defendant, and by the defendant to the plaintiffs.

Pleas to the second count.

To this count the defendant pleaded—first, that the bill was not presented—secondly, that he had not due notice

of its dishonor—thirdly, that, after the indorsement of the bill of exchange in the second count mentioned, and before the commencement of the suit, to wit, on the 28th March, 1832, in consideration that divers persons whose names were to the defendant unknown, creditors of William Crokat, then accepted and received from William Crokat a certain sum of money, to wit, 2*s.* 6*d.* in the pound upon their respective debts, in full satisfaction and discharge of their respective debts, the plaintiffs, then being the holders of the bill of exchange in the second count mentioned, accepted and received of and from William Crokat the like sum of 2*s.* 6*d.* in the pound upon the amount of the bill of exchange in the second count mentioned, that is to say, 106*l.* 5*s.*, in full satisfaction and discharge of the bill of exchange in the second count mentioned, without the knowledge or consent of the defendant; and the plaintiffs thereby then wholly released and discharged William Crokat from all liability upon the said bill of exchange in the second count mentioned, without the knowledge or consent of the defendant—verification.

The declaration also contained counts for goods sold and delivered, money lent, and money found to be due upon an account stated; upon which nothing turned.

Replications.

The plaintiffs joined issue on the first and second of each of the above sets of pleas, and replied de injuria to the third plea to the first count; and to the third plea to the second count they replied, that they did not after the indorsement of the bill of exchange in the second count mentioned, or at any time before the commencement of the suit, accept or receive of or from William Crokat the sum of 106*l.* 5*s.*, or any part thereof, in the said sixth plea mentioned, in full satisfaction and discharge of the said several premises in the second count mentioned, modo et formâ—concluding to the country.

The cause was tried before Coltman, J., at the sittings in London in the last term. The presentment and dis-

1838.

HOULDITCH v. CAUTY.

honor of the bills were proved; as also due notice of the dishonor of the first bill; and, with respect to the second, a notice of dishonor was proved to have been sent to the defendant, in the following terms:—

Notice of dishonor.

"Messrs. Houlditch's compliments to Mr. Cauty; are surprised he has not taken up Mr. Chaplin's bill, according to his promise that he would do so as soon as the sale was over. What is to be done with the bill? Are also surprised to hear that Mrs. Gib's bill *was returned to the holder unpaid.*"

It was objected, on the part of the defendant, that this was not a sufficient notice of dishonor to charge the drawer, inasmuch as it did not in express terms convey to him intelligence that the bill had been duly presented to the acceptor and refused payment by him; and *Solarte* v. *Palmer*, 5 M. & P. 475, 7 Bing. 530, 1 Tyr. 371, 1 C. & J. 417, 1 Scott, 1, 1 New Cases, 194, and *Boulton* v. *Welsh*, 4 Scott, 425, 3 New Cases, 688, were cited and relied on—and particularly the letter, where, in an action by an indorsee against an indorser of a promissory note, the following letter, addressed by the plaintiff to the defendant—"The promissory note for 200*l.* drawn by H. H., dated the 18th July last, payable three months after date, and indorsed by you, *became due yesterday, and is returned to me unpaid.* I therefore request you will let me have the amount forthwith"—was held not to be a sufficient notice of dishonor.

It further appeared, on the part of the plaintiffs, that, on the evening of the day on which the notice of dishonor was sent to the defendant, the latter called at the counting-house of the plaintiffs, expressed his surprise and regret that the bill had not been paid, and promised to write immediately to the parties in Edinburgh on the subject, and that he would see the bill paid.

The defendant was not in a condition to prove the fact stated in the third plea to the first count; the composi-

tion deed or letter of license by which it was alleged that time had been given to Chaplin not being produced by the party in whose custody the defendant had been led to suppose it was. An application was on this ground made to the learned judge to postpone the trial; but without success.

Scotch deed of assignation.

In support of the third plea to the second count, the defendant gave in evidence a Scotch deed of assignation, dated the 14th June, 1834. This deed—after reciting the bill, that it had been protested for non-payment at the instance of the plaintiffs, and that letters of horning were raised at their instance, and other proceedings had in the courts of Scotland, for the recovery of the debt from William Crokat; that, in virtue of the said letters of horning and the warrant to arrest therein contained, the plaintiffs caused arrestments to be used at the instance of them (the plaintiffs) and their mandatory against the said William Crokat in the hands of T. Robertson, accountant in Edinburgh, one of the surviving trustees of the deceased John Crokat (describing him) and in the hands of H. G. Dickson and M. Weir, both writers to the signet, two of the assumed trustees of the said deceased John Crokat, conform to executions of arrestment dated the 8th, 12th, and 17th November, 1832, as the said bill and protest thereon (registered in the books of council and session the 17th October, 1832), letters of horning, and executions of arrestment, more fully bear; that, upon the said diligence, the plaintiffs, on the 23rd November, 1832, raised and intented a summons of forthcoming at the instance of them (the plaintiffs) and their said mandatory before the Lords of Council and Session against the foresaid surviving and assumed trustees of the said deceased John Crokat, and against the said William Crokat, common debtor, for his interest, which summons was called in court on the 14th November then last, but no further steps had since been taken therein; that the whole surviving and assumed trustees of the said deceased John Crokat, on the 13th January,

1838.

HOULDITCH v. CAUTY.

1834, raised and intented a summons of multiple poinding and exoneration at their instance against the plaintiffs and their said mandatory, and also against certain other arresting creditors of the said William Crokat—proceeded as follows:—"And whereas, in consideration of the sum of 116*l.* 13*s.* 5*d.* paid to our mandatory by D. R. Souter, accountant in Edinburgh, we have agreed to grant the assignation under written; wherefore, we (the plaintiffs, describing them) with consent of the said A. C. M'L., our said mandatory, for any interest he may have in the premises as aforesaid, have made, constituted, and appointed, as we do hereby make, constitute, and appoint the said D. R. Souter, and his heirs and donators, our lawful cessioners and assignees in and to the 'foresaid principal sum of 850*l.* sterling contained in and due by the bill above narrated, and the whole interest due and to become due thereon; as also in and to the said bill, registered protest, letters of horning, and executions of arrestment above mentioned, whole tenor and contents thereof, with all that has followed or may be competent to follow thereon; but that in so far allenarly as the said principal sum and interest thereof, and the said bill and diligence hereby assigned, are or can form the grounds of a claim of debt at our instance against the said William Crokat, or through him against the trustees of the said deceased John Crokat; reserving always to us and our heirs and assignees all rights of recourse against the acceptor, drawer, and indorsers of the said bill other than the said William Crokat, for the balance of the said principal sum of 850*l.* sterling, and the interest due and to become due thereon, and for all expenses which we have incurred or may incur in recovering payment thereof: As also we, with consent aforesaid, do hereby assign the said D. R. Souter and his aforesaids in and to the foresaid summons of forthcoming raised and intented at our instance against the said trustees of the said deceased John Crokat, with all that has followed or may be competent to

follow thereon; together also with all right, interest, and claim competent to us as arresting creditors aforesaid, and raisers of the said process of forthcoming under the 'foresaid process of multiple poinding and exoneration brought at the instance of the said deceased John Crokat, surrogating and substituting the said D. R. Souter and his 'foresaids in our full right and place of the premises as aforesaid, with full power to them to ask, crave, and uplift from the said William Crokat, or from the trustees of the said John Crokat, arrestees foresaid, the principal sum and interest hereby assigned, and upon payment to grant discharges or conveyances thereof either in whole or in part: As also with full power to the said D. R. Souter to appear in the 'foresaid process of forthcoming at the instance of us and our said mandatory, and to sist himself as pursuer thereof in our place, and also to appear and sist himself as defender in the 'foresaid process of multiple poinding and exoneration brought at the instance of the said trustees of the said John Crokat in our place, and to lodge claims and interests in the said processes, dispute preferences therein, and recover payment of such sum or sums as shall be allocated to the debt hereby assigned, and generally to do every other thing concerning the premises which we could have done ourselves before granting hereof; declaring always that any further proceedings under the diligence against the said trustees or the said William Crokat hereby assigned, or any steps to be taken in the said processes of forthcoming and multiple poinding and exoneration, or either of them, or otherwise, shall always be at the expense of the said D. R. Souter and his 'foresaids; declaring also that the said proceedings shall not be taken in our names: which assignation, to the extent above written, and under the reservation and declarations foresaid, we bind and oblige ourselves and our heirs and successors to warrant to the said D. R. Souter and his aforesaids from all facts or deeds done or to be done by

1838.

HOULDITCH v. CAUTY.

us in prejudice hereof: And whereas the foresaid bill, registered process, and letters of horning, form the grounds of debt at our instance against the said acceptor, drawer, and indorsers of the said bill, other than the said William Crokat, and so cannot be delivered up along with this assignation; therefore we bind and oblige ourselves and our 'foresaids to make these writs forthcoming to the said D. R. Souter, and his 'foresaids on all necessary occasions previously to our obtaining a settlement of the balance of said debt from the other parties to the bill, upon their granting a receipt and obligation to return the same within a short, limited time, and under a suitable penalty; and having herewith delivered up to the said D. R. Souter the 'foresaid three executions of arrestment, and the 'foresaid summons of forthcoming, with exoneration annexed, to be used by him and his 'foresaids as their own proper writs and evidents in all time coming, we and the said A. C. M'L., our said mandatory, consent to the registration hereof in the books of Council and Session, or others competent, therein to remain for preservation, that letters of horning on six days' charge, and all other legal execution may pass upon a decree to be interposed hereto in form as effeirs, and thereto constitute ——— and ——— our procurators." In witness, &c.

The witness who produced this deed stated that the effect of it was to release William Crokat from all liability on the bill, it being the usual form in which releases of debtors by their creditors are drawn in Scotland; that Souter was also trustee for certain other creditors of Crokat in Scotland; and that similar deeds of assignation in respect of their several debts had been executed by them to him for the like consideration.

On the part of the plaintiffs, it was contended that this deed did not sustain the issue in support of which it was produced, inasmuch as it did not appear to have been executed by any creditor of Crokat besides the plaintiffs, and

1838.

HOULDITCH v. CAUTY.

was not in fact a release, but a mere assignment by the plaintiffs to Souter of their right to sue Crokat.

A verdict having been found for the plaintiffs for 1048*l.*, the amount of the two bills and interest—the jury conceiving the conversation with the defendant on the day on which the notice was sent, to amount to an acknowledgment of its sufficiency—

Thesiger, in the last term, obtained a rule nisi to reduce the damages by the sum of 850*l.* and interest, on the second count, and that the verdict might be entered for the defendant on that count, or for a new trial.—The first part of the motion was founded upon the objection to the sufficiency of the notice of dishonor, the second upon affidavits of surprise. The alleged surprise applied to both the bills. With regard to the first, it appeared that the defendant had been led to believe that the letter of licence mentioned in the third plea to the first count was in the hands of the attesting witness (clerk to the attorney by whom it was prepared), who was accordingly served with a subpœna duces tecum, and promised to attend with the document, but, when called on at the trial to produce it, stated that he had delivered it to another clerk, who was not to be found.—With respect to the release set up in the sixth plea, it was sworn that the defendant's attorney had supposed that the composition or arrangement between William Crokat and his creditors was made by *one deed*, and only learned on the arrival of Mr. Weir, the witness who produced the document that was given in evidence, the evening before the cause was tried, that such arrangement was effected by separate instruments or deeds of assignation by each individual creditor to Souter; and that Weir would have produced all the deeds had he supposed them essential to the support of the defendant's case.

1838.

HOULDITCH v. CAUTY.

1. As to the notice of dishonor.

Wilde, Serjeant, *Kelly*, and *Petersdorff*, now shewed cause.—The notice of dishonor given in this case was sufficient. In *Boulton* v. *Welsh*, 4 Scott, 425, 3 New Cases, 688, this court, professing to be governed by the authority of *Hartley* v. *Case*, 1 C. & P. 555, 6 D. & R. 505, 4 B. & C. 339, and *Solarte* v. *Palmer*, 5 M. & P. 475, 7 Bing. 530, 1 Tyr. 371, 1 C. & J. 417, 1 Scott, 1, 1 New Cases, 194, held that a letter intimating to the indorser of a note that the note "became due yesterday, and was returned unpaid," was not a sufficient notice of dishonor to charge the assignee: Tindal, C. J., observing—"It certainly does not give the defendant information whence he is bound to know that payment of the note had been duly demanded of the maker and refused by him. The letter merely states that the note became due on the preceding day, and was returned unpaid: consistently with that notice, there may have been no presentment to the maker of the note. The two important points upon which the notice must be precise, are, the presentment of the bill or note to the acceptor or maker, and the non-payment. The letter in the present case is deficient in the former requisite." Formerly, any intimation that the party to whom the notice was addressed was expected to pay the bill or note, was considered sufficient, the object of the notice being to apprise the party that the holder does not rest upon the credit of the maker or acceptor (*s*): and much inconvenience has resulted to the mercantile world from the very narrow construction that has been put upon the notice by some of the modern cases. It is difficult to conceive what intimation could be more precise and definite, or more intelligible to a man of business, than that a bill has been "returned to the holder unpaid:" unless it imports a neglect on the part of the acceptor to pay on presentment, it means nothing. In Bayley on Bills, 5th edit. 207, it is said: "The notice

(*s*) See Tindal v. Brown, 1 T. R. 167.

1838.

HOULDITCH v. CAUTY.

must come from the holder or some party entitled to call for payment or reimbursement; and, though there is no prescribed form for it, it ought to import that the person to whom it is given is considered liable, and that payment from him is expected." With respect to *Solarte* v. *Palmer*, the principle of which the courts will not feel disposed to extend, it is not to be collected from the notice that the bill was even due; it was impossible to understand from the supposed notice whether payment was demanded from the indorsers because the bill was dishonored or because it had been refused acceptance. Tindal, C. J., in delivering the judgment of the Exchequer Chamber in that case, says—5 M. & P. 481—"The notice of dishonor, which is commonly substituted in this country in the place of a formal protest, such formal protest being essential in other countries to enable the plaintiff to recover (Pothier, Traité du Contrat de Change, Part 1, cap. 5, s. 2, art. 1, s. 5), most certainly does not require all the precision and formality which accompanied the regular protest, for which it has been substituted. But it should at least inform the party to whom it is addressed, either in express terms, or by necessary implication, that the bill has been dishonored, and that the holder looks to him for payment of the amount. Looking at this notice, we think no such intimation is conveyed in terms, or is to be necessarily inferred from its contents. Besides, it is perfectly consistent with this notice, that the bill has never been presented at all, and that the plaintiffs mean to rely upon some legal excuse for its non-presentment. The present case is stronger against the sufficiency of the notice than that of *Hartley* v. *Case*, where there was at least an allegation that the bill *had become due*, which is not found here." In *Hedger* v. *Steavenson*, 2 M. & Welsby, 799, a notice of the dishonor of a promissory note, in these words—"I am desired by Mr. H. to give you notice that a promissory note, dated August 10th, 1835, made by S. T. for 99*l.* 18*s.*, payable to your order two months

1838.

HOULDITCH v. CAUTY.

after date thereof, because due yesterday, *and has been returned unpaid.* I have to request you will please remit the amount thereof, *with* 1*s.* 6*d. noting,* free of postage, by return of post"—was held a sufficient notice of dishonor. On the part of the defendant, *Boulton* v. *Welsh* was cited as shewing that the notice was insufficient. In opposition to that case was placed *Grugeon* v. *Smith* (a decision of the King's Bench in the same term), 2 Nev. & Per. 303, where the following notice was held to be sufficient– " Your bill, drawn on T. T., and accepted by him, is this day returned ——— *with charges,* to which we request your immediate attention." And Patteson, J., said: " *Solarte* v. *Palmer* is a very different case. The notice there contained nothing relating to dishonor by the acceptor; whereas here there is express notice that the bill is returned ——— with charges; and it is impossible to doubt that that is a statement of its having been returned dishonored." Speaking of *Solarte* v. *Palmer,* Parke, B., in *Hedger* v. *Steavenson,* says: " By that decision we are bound, though I am not prepared to say that I am bound by all the reasoning or language of the learned judges in giving their opinion, and therefore should myself doubt whether we could go so far as to say that it ought to appear upon the face of the instrument, ' by *express terms or necessary implication,* that the bill was presented and dishonored;' it seems to me enough if it appear by reasonable intendment, and would be inferred by any man of business, that the bill has been presented to the acceptor, and not paid by him. We must not put such a meaning on that expression, as to say that the language of the instrument must be so precise as to exclude the possibility of any other inference than that the bill had been so presented and returned unpaid." And, speaking of the notice in the case before him, the learned Baron proceeds—" It states the time when the note became due, and that it had been returned unpaid. Can

any one doubt the use of the term 'returned unpaid?' The word 'returned' is almost a technical term in matters of this nature, and means that the bill has come to maturity, has been presented, and has not been paid. Upon reading this notice I should say that it appears from it by necessary implication (in the meaning I attach to the term,) that the note has been duly presented, and dishonored. This is the opinion which I should have formed previously to the case of *Boulton* v. *Welsh*; and we are not called upon to over-rule that case without some authority to the contrary. The notice in *Grugeon* v. *Smith* was in the same terms as the present; and, as we must determine to which of the two cases we will subscribe, I must say I think that the one in the Common Pleas was not rightly determined. There is, indeed, one circumstance mentioned in this notice of dishonor which does not appear in *Boulton* v. *Welsh*, viz. that the bill had been noted: that constitutes a distinction between the two cases; but I disclaim to go on that distinction (*t*)." In *Woodthorpe* v. *Lawes*, 2 M. & Welsby, 109, a bill of exchange, indorsed in blank, was left by the indorsee at the office of one R., an attorney, to be presented by him. On being presented by R., it was dishonored. R. wrote to the drawer on the following day, describing the bill, and stating that it was dishonored, subscribing his own name and residence to the letter: and it was held that this was a sufficient notice of dishonor, though the letter

(*t*) It should be observed, that, at the time Hedger v. Steavenson was under discussion in the court of Exchequer, no report of Boulton v. Welsh, which was determined in the previous term, had appeared in an authorized shape. A note of the case was read from a weekly publication called "The Jurist:" but Mr. Baron Parke could not be persuaded that the judgment of the court of Common Pleas was there correctly represented.

Boulton v. Welsh, in the Common Pleas, and Grugeon v. Smith, in the King's Bench, were both decided in Easter Term, 1837; neither was cited on the argument of the other.

1838.

HOULDITCH v. CAUTY.

did not state who was the holder of the bill, or on whose behalf the application was made, or where the bill was lying.

Effect of the defendant's promise to pay.

Supposing the notice, standing alone, would not be sufficient, the defendant's promise to pay the bill, on the same day, when there was still time to give a better notice, must be taken either as an admission that a sufficient notice had been given, or that the formality was dispensed with. In *Hicks* v. *The Duke of Beaufort*, 4 New Cases, 229, 5 Scott, 598, in an action against the drawer of a bill of exchange, the defendant pleaded that he had had no notice of the dishonor of the bill. At the trial it was proved, on the part of the plaintiff, that the defendant, upon being called upon for payment of the bill after it had been dishonored, observed "that it was hard upon him to be compelled to pay it, as he had only put his name to it as drawer for the accommodation of the acceptor;" and added, that, "if the acceptor did not pay it, he (the defendant) must:" but he requested the witness to exhaust all his influence to obtain the money from the acceptor before he resorted to him: it was held that this was evidence (though not conclusive evidence) either that the defendant had had notice of dishonor, or that he waived it.

The deed produced by Weir did not sustain the issue tendered by the sixth plea. It was a mere assignment by the plaintiffs to Souter of their rights as against William Crokat: no other creditor of Crokat was party to it. There was therefore a fatal variance between the allegation and the proof (*u*).

(*u*) A discussion arose as to whether or not the attorney in whose possession Chaplin's release or letter of license was, could have been compelled to produce it if put in the box. Cocks v. Nash, 3 M. & Scott, 164, 9 Bing. 723, was cited on the one side, and Mills v. Oddy, 6 C. & P. 728, on the other. The court, without giving any opinion upon the point (except that Park, J., intimated a doubt as to the correctness of the rule laid down by Parke, B., in the latter case), were disposed to make the rule absolute

1838.

HOULDITCH v. CAUTY.

Humfrey, in support of the rule.—It is of the utmost importance to commercial men that there should exist some precise and well defined rule upon this subject. It is admitted, on all hands that the court are bound by the decisions in *Hartley* v. *Case* and *Solarte* v. *Palmer*. It is impossible to hold this notice sufficient, without derogating from the authority of those cases, and distinctly overturning *Boulton* v. *Welsh*. The present case is materially distinguishable from those upon which so much reliance has been placed on the part of the plaintiffs. In *Woodthorpe* v. *Lawes*, the notice distinctly stated that the bill *was returned dishonored and remained unpaid:* in *Hedger* v. *Steavenson*, the party was informed that the bill was *returned unpaid*, and that a charge had been incurred of 1*s.* 6*d.* for *noting:* and in *Grugeon* v. *Smith*, the notice was that the bill was "returned ——— *with charges:*" in each of these cases, therefore, there was something more than appears upon the face of the notice in the present case. The notice in *Boulton* v. *Welsh* differs from the notice here only in this, that there the party had an intimation that the note was *overdue*, a statement that is wanting here.

As to the sufficiency of the notice.

Then, supposing the notice to be insufficient, the admission of the defendant on the same day, or, putting it at the highest, his promise to see the bill paid, cannot aid it. In *Cuming* v. *French*, 2 Camp. 106, n., it was held, that, if the drawer or indorser of a bill, after having been arrested, without acknowledging his liability, merely offers to give a bill by way of compromise, for the sum demanded, this does not obviate the necessity of proving notice. In *Baker* v. *Birch*, 2 Camp. 107, where a few days before a bill became due the acceptor informed the drawer that he would be unable to pay it, told him he (the drawer) must

As to the supposed promise.

for a new trial on the ground of surprise, as far as concerned the bill set out in the first count: but the plaintiffs elected to give up their claim to that bill and interest.

1838.

HOULDITCH v. CAUTY.

take it up, and gave him part of the amount to assist him in doing so, and the drawer received the money and promised to take up the bill; it was held, that, in an action by the indorsee against the drawer, the latter might nevertheless set up as a defence that the bill was not duly presented for payment, and that he had not had regular notice of its dishonor. In *Borradaile* v. *Lowe*, 4 Taunt. 93, a letter written by the indorser of a bill, who had been applied to for payment after several days' laches, telling the plaintiff that he would not remit till he received the bill, and desiring the plaintiff, if he considered him (the defendant) as unsafe, to return the bill to Trevor & Co. (who were prior indorsers of the bill, and also bankers at the defendant's place of residence), was held not to be such a waiver of laches and promise to pay, but that the defendant, on discovering that in law he was discharged, might refuse payment. In *Standage* v. *Creighton*, 5 C. & P. 406, it was held that an offer on the part of the indorser of a bill to pay part of the amount, and the costs, and to give a warrant of attorney for the residue, will not dispense with proof of notice of dishonor. And in *Pickin* v. *Graham*, 1 C. & M. 725, 3 Tyr. 923, the day after a bill of exchange had been dishonored in London, and before the fact of the dishonor could be known in Rotherham, in Yorkshire, where the last indorser resided, the drawers' clerk called on him there, and a conversation took place between them as to the bill being likely to come back, when the clerk said—"I suppose there will be no alternative but my taking up the bill, and if you will bring it to Sheffield on Tuesday, I will pay the money." The indorser did not receive either the bill or notice until some days after the Tuesday, and notice of dishonor was not given to the drawer in due time: it was held that the promise did not dispense with giving due notice of the dishonor to the drawer. Vaughan, B., there says: "What passed in this case seems to me to amount only to this, that, in a

conversation about the expected dishonor of the bill, the agent of the drawers, supposing that they had no alternative but to pay, used the expressions relied on, in contemplation of a regular notice of dishonor about to be received. His words import a fear of being compelled to pay if the bill came back in due course, and that, as it would probably do so, there would then be no other course to be adopted but to pay it. That, in my opinion, does not amount to an absolute promise to pay the amount." [*Tindal*, C. J.—The defendant might have received a good notice by word of mouth when the parties were together, there being still time for it.] The jury have found no other notice than the letter. [*Coltman*, J.—No other *written* notice.] It cannot after the finding of the jury be assumed that during the conversation alluded to a sufficient verbal notice was given. That the plaintiffs were in time to give such notice, makes no difference, if they in fact did not do so. In *Hicks* v. *The Duke of Beaufort*, it did not appear in what form the notice was given: but it was held that the conversation deposed to by the witnesses was evidence whence the jury might presume that a regular notice had been given. That doctrine of presumption, however, fails when you shew what the notice actually was; for, no presumption can be made contrary to the fact; and that cannot be *presumed* to have been rightly done which is proved to have been done illegally and informally.

The deed produced by Weir sustained the issue raised by the sixth plea. That issue in substance was whether or not the plaintiffs had entered into an arrangement by which they accepted a sum short of the entire amount of the bill in satisfaction and discharge of Crokat's liability thereon. It was perfectly immaterial to that issue whether there were or were not other creditors. At all events, the defendant is entitled to a new trial, on the ground of surprise in this respect.

1838.

HOULDITCH v. CAUTY.

TINDAL, C. J.—This is an action on a bill of exchange for 850*l.*, drawn on the 28th March, 1832, by one Anne Gib, upon one Rainsford, payable three months after date, and indorsed by Anne Gib to one Crokat, by Crokat to the defendant, and by the defendant to the plaintiff. To the count on this bill, the defendant pleaded—first, that it had not been duly presented for payment—secondly, that he had not due notice of the dishonor of the bill—thirdly, that, in consideration that divers persons, creditors of Crokat, had accepted from Crokat 2*s.* 6*d.* in the pound on their respective debts, in satisfaction and discharge of the same, the plaintiffs received the like amount in satisfaction and discharge of Crokat's liability on the bill, without the knowledge or consent of the defendant, and thereby released and discharged Crokat from all liability upon the bill. A verdict passed against the defendant upon each of these pleas: and the question before us is, whether or not the verdict properly so passed. As to the first plea there is no dispute. With regard to the second—that there was no notice, or an insufficient notice of dishonor—we have been strenuously urged, upon the authority of two cases determined in the King's Bench and Exchequer respectively, about the time of and since our late decision in this court of *Boulton* v. *Welsh*, viz. *Grugeon* v. *Smith*, and *Hedger* v. *Steavenson*, to say that the judgment we then pronounced is not warranted by law; or, at least, if not improper, is one that we ought not to be disposed to carry further. I see no reason, however, for holding *Boulton* v. *Welsh* to be a judgment not warranted by law. It certainly went the full length of *Solarte* v. *Palmer*; but no further. I should not be slow to recede from an opinion, when properly satisfied that it had been too hastily formed: but I am not satisfied by anything that was said in *Grugeon* v. *Smith* or *Hedger* v. *Steavenson*, to recall any part of what fell from me in *Boulton* v. *Welsh*. In each of those cases there appeared a circumstance that did not exist in *Boul-*

ton v. *Welsh:* in the one, the party was informed that the bill was "returned ——— with charges," in the other, a demand was made of 1*s.* 6*d.* for "noting;" which would necessarily convey to the mind of the person addressed that the bill in the one case and the note in the other had been presented for payment, and was dishonored. However, I am perfectly ready to re-consider the decison in *Boulton* v. *Welch*, provided I be not called upon to depart from the principle laid down in *Solarte* v. *Palmer*. Taking the letter in this case alone, it appears to me that it would fall short of a proper notice; it merely states that the bill "was returned to the holder unpaid." That approximates very closely to the notice in *Boulton* v. *Welsh*. But, upon the same day on which the notice was given, the defendant called at the counting-house of the plaintiffs, expressed his surprise and regret that the bill had not been paid, and promised to write immediately to write to Edinburgh on the subject, and that the bill should be paid. It appears to me, that, coupling that conversation with the letter, we are bound to hold that the defendant has had a regular and sufficient notice. The parties being thus together, a single word from the defendant intimating dissatisfaction with the form of the notice, would have enabled the plaintiffs to supply the deficiency. The plaintiffs having thus been lulled into a fatal security, I think we ought to be astute to discover grounds for holding the notice sufficient; and, the jury having had all the facts fully before them, and having found their verdict upon the express footing of a valid notice, whether verbal or in writing is perfectly immaterial, I, for one, am not disposed to disturb it.

With respect to the third plea, I am of opinion that that there was no evidence to support it. It has been said, that, if the deed set out in that plea be looked at, it will be found to operate as a release of Crokat's liability upon the bill; and that, as the defendant was taken by surprise, it would be hard not to allow him to have another

1838.

HOULDITCH v. CAUTY.

the defendant said, that, as the debt was justly due, he would pay it. Then it stands on the first conversation, as an absolute promise to pay the bill; thereby admitting (for, I do not put it on the ground of waver of any objection to the non-presentation of the bill in due time as existing in fact,) that there did not exist any objection to his payment of the bill; but that every thing had been rightly done. That supersedes the necessity of the ordinary proof. And, though an objection was stated in the second conversation to the want of regular notice, yet the objection was immediately waved." In the present case, no objection was made to the sufficiency of the notice, though the defendant's remarks shewed that he had received it.

With respect to the third plea, I agree with my Lord in thinking that that plea would not be made out by the deed that has been produced to us.

BOSANQUET, J., being obliged to leave, merely expressed his concurrence with the opinion of the rest of the court.

COLTMAN, J.—It appears to me that there has been a sufficient notice of dishonor in this case. It may be that the *written* notice was not sufficient: but it appeared that the parties, that is, the holders and the defendant, the indorser, met on the evening of the day upon which the letter containing the notice was sent to the defendant, when the plaintiffs were within time to give a fresh notice; and the defendant, intimating his surprise at the information he had received as to the dishonor of the bill, in effect promised to pay it, if the other parties to it did not. I think it would be monstrous to permit him, after having thus lulled them into a state of fancied security, to turn round upon the holders and contend that he has had no formal notice. Suppose the defendant had expressly agreed to dispense with notice—can there be a doubt but that would be a

1838.

HOULDITCH v. CAUTY.

valid agreement? The conversation, in my opinion, amounts to that. *Baker* v. *Birch* and *Pickin* v. *Graham* are clearly distinguishable: in neither of them was it known at the time of the promise whether or not the party to whom it was made would ever be in a situation to be entitled to call upon the defendant. And in *Borradaile* v. *Lowe*, the party was actually discharged by the plaintiff's laches at the time he made the promise, though not then aware of the fact. We are therefore wholly unfettered by authority. Reason and justice and common sense concur in favor of holding that there has been a sufficient notice in this case: and of this opinion were the jury, who were the proper judges of the effect of the conversation.

Rule discharged (*r*).

(*r*) The written notice in this case was clearly insufficient; but the ground of the decision seems to be, that, taking the written notice and the subsequent conversation together, and regard being had to the time at which the conversation took place, the jury were warranted in inferring, not, as in Hicks v. The Duke of Beaufort, that the party waived his right to a formal notice, but that he had had a sufficient notice.

JAMES and Others *v.* BOURNE and Others.

Thursday, May 3rd.

ASSUMPSIT against carriers for the non-delivery of goods pursuant to their undertaking.

The first count of the declaration stated that the plaintiffs, on the 22nd August, 1836, at the defendants' request, caused to be delivered to them the defendants divers goods and merchandize, to wit, three boxes of linen of the plain-

In assumpsit against carriers for the non-delivery of goods, the declaration contained two counts—the first, on a contract for the conveyance of the goods from the port of loading to the port of discharge—the second, on a contract to take care of the same goods at the wharf where they should be landed, and to convey them to the plaintiff's place of business, for other reward to the defendants in that behalf:—The court refused to strike out one of the counts, upon a suggestion that the joining them was an apparent violation of the rule of Hilary Term, 4 Will. 4, r. 5.

1838.

JAMES v. BOURNE.

tiffs, then being in good order and condition, and of great value, to wit, of the value of 300*l.*, to be taken care of and safely and securely carried and conveyed by the defendants in and by a certain steam-vessel of the defendants, called the City of Londonderry, from certain parts beyond the seas, to wit, from Belfast, in Ireland, to Dublin, and there, to wit, at Dublin aforesaid, to be reshipped into a certain other steam-vessel of the defendants called the William Fawcett, and to be by the defendants carried and conveyed in and by the said last-mentioned steam-vessel from Dublin aforesaid to London, and there, to wit, at the port of London aforesaid, to be delivered in the like good order and condition (all and every the dangers and accidents of the seas, steam navigation, of whatever nature and kind soever, excepted) unto the plaintiffs or assigns, on paying for the said goods certain freight and charges, with primage and average accustomed; and thereupon, in consideration of the premises, and of the said freight and reward, the defendants then promised the plaintiffs to take care of and safely and securely carry and convey and deliver the said goods and merchandize as aforesaid, all and every the dangers and accidents of the seas and steam navigation, of whatever nature and kind soever, excepted: and, although the defendants then took and received the said goods and merchandize of and from the plaintiffs for the purposes aforesaid; and although the said steam-vessel called the William Fawcett afterwards, to wit, on the 28th August, 1836, safely arrived at London aforesaid, with the said goods and merchandize on board; and although none of the said dangers and accidents so excepted as aforesaid prevented the safe carriage and delivery of the said goods and merchandize, or of any part thereof; and although a reasonable time for the delivering the said goods and merchandize had long since and before the commencement of the suit elapsed; and although the plaintiffs were always ready and willing to pay the

Promise.

1838.

JAMES v. BOURNE.

defendants the said freight and charges as aforesaid, with such primage and average as aforesaid; of all which said several premises the defendants, to wit, on the day and year last aforesaid, had notice, and were then requested by the plaintiffs to deliver to them the said goods and merchandize: yet the defendants did not nor would at any time deliver the said goods and merchandize, or any part thereof, to the plaintiffs, but had hitherto wholly neglected so to do; and the defendants so carelessly, negligently, and improperly conducted themselves with respect to the said goods and merchandize whilst they were in their custody for the purposes aforesaid, that, for want of due care in the defendants and their servants in that behalf, the said goods and merchandize afterwards, to wit, on the day and year last aforesaid, became and were wholly lost to the plaintiffs, and, by reason of the premises, the plaintiffs had wholly lost and been deprived of divers great gains and profits to a large amount, to wit 200*l.*, which would otherwise have arisen and accrued to them by the sale of the said goods and merchandize.

Breach.

The second count stated that the plaintiffs, on the 22nd August, 1836, at the defendants' request, then caused to be delivered to the defendants certain other goods and merchandize, to wit, three boxes of linen of the plaintiffs, then being in good order and condition, and of great value, to wit, of the value of 1000*l.*, to be carried and conveyed by the defendants in and by a certain other steam-vessel of the defendants called the City of Londonderry, from Belfast aforesaid to Dublin aforesaid, and there, to wit, at Dublin aforesaid, to be reshipped into a certain other steam-vessel of the defendants called the William Fawcett, and to be by the defendants carried and conveyed in and by the said last-mentioned steam-vessel from Dublin aforesaid to London aforesaid, and there, to wit at London aforesaid, to be delivered in the like good order and condition as last aforesaid, all and every the dangers and ac-

Second count.

1838.

JAMES v. BOURNE.

cidents of the seas, steam-navigation, of whatever nature and kind soever, excepted, unto the plaintiffs or assigns, on paying for the said last-mentioned goods and merchandize certain freight and charges, with primage and average accustomed; and thereupon, in consideration of the premises in this count mentioned, and that the plaintiffs, at the request of the defendants, to wit, on the day and year last aforesaid, employed the defendants to take care of the said last-mentioned goods and merchandize at the wharf where they should be landed from the said last-mentioned steam-vessel at the port of London aforesaid, and to convey and carry the same from such wharf to a certain place of business of the plaintiffs situate in Queen Street, Cheapside, in the city of London, and to deliver the same to the plaintiffs at the said place of business in a reasonable time in that behalf after they should be landed at such wharf as aforesaid, for *other reward* to the defendants in that behalf, the defendants, to wit, then promised the plaintiffs to take care as last aforesaid of the said last-mentioned goods and merchandize at the wharf where they should be landed from the said last-mentioned steam-vessel at the port of London, and to carry and convey them from such wharf to the said place of business of the plaintiffs, and there to deliver them to the plaintiffs in a reasonable time in that behalf after they should have been landed at such wharf as aforesaid: and although the said last-mentioned goods and merchandize, to wit, on the 28th August, 1836, arrived in safety by the said last-mentioned steam-vessel at the port of London aforesaid, and were safely landed at a certain wharf there called Fenning's Wharf; and although the defendants, after such landing, to wit, on &c. last aforesaid, took and had the said last-mentioned goods in their custody and possession at the said wharf, for the purpose of taking care of them at the said wharf as aforesaid, and carrying, conveying, and delivering them as last aforesaid; and although a reasonable time for such carry-

Promise.

Breach.

ing, conveying, and delivering as last aforesaid elapsed long ago, and long before the commencement of the suit; and although the plaintiffs had always been ready and willing to pay to the defendants the said last-mentioned freight, charges, primage, and average; and although the plaintiffs had always been ready and willing to pay the defendants the said other reward in this count mentioned, according to the terms of the said last-mentioned employment; of all which premises in this count mentioned the defendants afterwards, to wit, on &c. last aforesaid, had notice, and were then requested by the plaintiffs to take care of and carry, convey, and deliver the said last-mentioned goods and merchandize according to their said last-mentioned promise; yet the defendants did not nor would take care of, or carry, convey, or deliver to the plaintiffs at the said place of business, or anywhere else, the said last-mentioned goods and merchandize, or any part thereof, in such reasonable time as last aforesaid, or at any time whatsoever; and the defendants wholly failed and made default therein; and the defendants behaved and conducted themselves so negligently, carelessly, and improperly in the premises last aforesaid, that, by and through their improper conduct in that behalf, the said last-mentioned goods and merchandize became and were wholly lost to the plaintiffs; and by reason of the premises in this count mentioned the plaintiffs had wholly lost and been deprived of divers great gains and profits, to a large amount, to wit 100*l.*, which would otherwise have arisen and accrued to them by the sale of the said last-mentioned goods and merchandize.

Upon an affidavit that there was in fact but one cause of action, but one contract between the parties, and one shipment, application was made on the part of the defendants to Park, J., at chambers, to strike out one of the counts, on the authority of s. 5 of the "First general rules and regulations" as to pleading, of Hilary Term, 4 Will. 4,

1838.

JAMES v. BOURNE.

or that the summons might be specially indorsed pursuant to s. 6. The learned judge, however, declined to interfere, unless the defendants would consent that the contract as stated in the second count should be given in evidence under the first.

Kelly, on a former day in this term, applied for a rule nisi to the same effect.—By the 5th section of the rules above referred to, it is provided that "several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each: therefore, counts founded on one and the same principal subject-matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed. *Ex. gr.* Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed; for, they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract." And s. 6 provides, that, "where more than one count, plea, avowry, or cognisance, shall have been used *in apparent violation of the preceding rule*, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the counts, pleas, avowries, or cognizances are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognisances introduced in violation of the rule, be struck out at the cost of the party pleading; whereupon the judge *shall order* accordingly, *unless he shall be satisfied*, upon cause shewn, *that some distinct subject-matter of complaint is bonâ fide intended to be established in respect of each of such counts*, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognisances, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also

specify the counts, pleas, avowries, or cognizances mentioned in such application which shall be allowed." And s. 7 contains provisions as to costs. To the benefit of these rules the defendants in this case are clearly entitled. The language of the rule is positive—" several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each." [*Tindal*, C. J.—Must not the violation of that rule, to entitle the party to have the indorsement made on the summons, be *apparent* on the face of the pleadings?] It may be made apparent by affidavit; the party is to apply to the judge *suggesting* that the rule has been violated. However, it is immaterial here whether the affidavit be received or not, though it has never yet been so decided: it is manifestly apparent upon the face of the declaration itself, that both counts are founded upon one and the same contract. In each count, three bales of linen are alleged to have been shipped at Belfast, on the same day, on board the City of Londonderry, to be conveyed to Dublin, and there transshipped on board the William Fawcett, to be delivered—in the first count, at the port of London—in the second, in Cheapside. Who can for a moment doubt that these are merely different modes of stating the same contract? [*Tindal*, C. J.—There might have been two bills of lading. We must hold the balance fairly between the parties. If the second count is struck out, I think the plaintiffs should be allowed to prove under the first all that they might have proved under the second.] If any difficulty should arise at the trial as to the proof of the contract as alleged, the plaintiffs may apply to the judge to amend. [*Tindal*, C. J.—The defendants may then say they are not prepared to meet the amended declaration; and so the cause may go over. Unless this was a case for an amendment instanter, I think we ought not to interfere. The power of amendment at Nisi Prius was made the foundation of these rules; and their construction should be co-extensive with that

1838.

JAMES v. BOURNE.

power. The defendants cannot be hurt by both counts being allowed to stand: they will have the costs of the count upon which the plaintiff fails. However, the rule may go, in order that the matter may be more fully discussed.]

A rule nisi having been granted (*x*)—

Stephen, Serjeant, and *Crompton*, now shewed cause.—There is no apparent violation of the rule referred to. The first count is in the common form of a count on a bill of lading, and charges the non-delivery of the goods at the wharf: the second count merely states the bill of lading by way of inducement, and charges the breach of a contract to convey the goods to the plaintiffs' warehouse in Cheapside. These are clearly two distinct contracts; and they are not the less so because they may relate to the same goods. "A count for freight upon a charter-party, and for freight pro ratâ itineris upon a contract implied by law, are to be allowed." In *Thoroton* v. *Whitehead*, 1 M. & Welsby, 14, 1 Tyr. & G. 316, where the declaration contained one count for double rent on the statute 11 Geo. 2, c. 19, s. 18, and another count for use and occupation; the the court refused a rule to strike out one of them. That case is even stronger than the present. In Tidd's New Practice, 218, it is said, that, "although there has been but one transaction between the parties, yet there may have been several causes of action arising out of it, which may be made the subject of several counts: thus, in an action on the case against the sheriff, one count may be inserted in the declaration for not taking the defendant when he had an opportunity, and another for suffering him to escape; for, there might have been a time when the sheriff might have made the arrest and had not done so, or he might have arrested the party and afterwards per-

(*x*) The rule was *not* drawn up upon reading the affidavit, but merely upon reading the declaration.

mitted him to escape—*Guest* v. *Everest*." In *Jenkins* v. *Treloar*, 1 M. & Welsby, 16, 1 Tyr. & G. 316, 4 Dowl. 690, the ground upon which the court of Exchequer proceeded was, that there was an apparent violation of the rule, and that the two counts might be supported upon the same evidence; which is not the case here. This is the first time the court has been called upon to act upon these rules in a case where the judge at chambers has refused to make an order: it is not usual for the court to interfere where a discretion is vested in the judge—*Tadman* v. *Wood*, 4 Ad. & E. 1011. [*Tindal*, C. J.—Very little discretion is left to the judge: he has only the choice of one of two courses.] There could be no amendment here, as suggested: it would be substituting an entirely new cause of action.

Kelly, in support of his rule.—The only question is, whether the record as framed is in apparent violation of the rule before referred to: if it is, there can be no doubt as to the jurisdiction of the court to order one of the counts to be struck out. That the joining these two counts is in direct violation of the rule, no one can read them and for a moment doubt. To entitle a party to recover freight upon a charterparty, it must be shewn that the contract was a subsisting contract down to the time of the delivery of the goods: it is impossible to say that the same body of evidence would be necessary to support such a claim, as would be necessary to sustain a count for freight pro ratâ itineris. So, in the case of a count on a bill of exchange and a count for the consideration; the same evidence would not support both counts. But here, the contract being confessedly but one single contract, the very same, or nearly the same evidence would be requisite to the support of both these counts. *Jenkins* v. *Treloar*, 1 M. & Welsby, 16, 1 Tyr. & G. 316, 4 Dowl. 690, is precisely in point. There, the declaration contained one

1838.

JAMES v. BOURNE.

count claiming a fee or reward, in the name of metage, on coals imported into the port of Truro, alleged to be due to the plaintiff as lessee under the corporation of Truro of an antient office of meter, to which the fee was stated to be incident, and another count claiming the same sum as a port-duty; and the court held that these two counts were only different statements of the same subject-matter of complaint, within the meaning of the rule of Hilary Term, 4 Will. 4, and that both could not be allowed to stand. Lord Abinger said: "If I thought the judge at chambers had a discretion, or that the rules gave us a discretion, I should be disposed to allow both counts in this case. But, after a good deal of consideration, I think the rules are peremptory *upon us*, and compel us to make this rule absolute. This is the same thing claimed on different contracts; the same sum proved by the same evidence." And Parke, B., said: "I also am of opinion that this case is brought within the terms of the rule. In all the cases given as examples, the claims are on different contracts, and for different sums. But, when you come to analyse this case, it resolves itself into two different modes of stating the consideration for the same grant of the crown. In substance, it is a statement of the same grant in different ways; different statements, that is, of the same subject-matter of complaint." The rule was made absolute to strike out one count of the declaration, with costs of striking it out, unless the judge at chambers, on a reference back to him, should exercise the discretion given by the rule, of allowing both counts, on the undertaking of the plaintiff to give evidence of substantially different claims.

TINDAL, C. J.—This is an application to the court, not by way of appeal from the decision of my Brother Park, but with reference to its general jurisdiction, which is not taken away by any of the new rules, though, in the exer-

1838.

JAMES v. BOURNE.

cise of its discretion, the court is to be guided by them. The question is, whether the allowing the two counts to remain upon the record will be a violation of the rule to which our attention has been called. I am of opinion that it will not. Undoubtedly, if the words of the 5th rule be taken in their more general sense, the introduction of the second count here would be a violation of it, the subject-matter of complaint, viz. the loss of the goods, being the same in both counts. But, construing the rule by the examples that are given, I think it is perfectly clear, that, if the two counts disclose several and distinct contracts, the rule will not be violated by suffering them to remain; to strike one of them out would, as it seems to me, be a very harsh and unnecessary extension of the rule. The first count is upon a contract to carry the plaintiffs' goods from Belfast to Dublin, and thence to the port of London, there to be delivered to the plaintiffs on payment of freight; the second is upon a contract to carry the goods from the wharf where they should be landed to the plaintiffs' warehouse. The second count no doubt relates to the same "subject-matter of complaint," so far as concerns the goods. But it is impossible to hold that the two counts do not disclose on the face of them separate and distinct contracts. Referring to the examples given in the rule, it will be found that a "distinct subject-matter of complaint," in cases of contract, means "a separate and distinct contract." "Counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed: Ex gr. Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed; for, they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract." Is it inconsistent with this declaration to suppose that there may have been one contract for the

1838.

JAMES v. BOURNE.

conveyance of the goods under a bill of lading to the port of London, and also a further contract for a separate and distinct reward to carry the goods a further journey? That would not be introducing a condition; but a different contract, importing a different degree of liability. Let us take the next example—"Counts for not giving, or delivering, or accepting a bill of exchange in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed. So, counts for not accepting and paying for goods sold, and for the price of the same goods as goods bargained and sold, are not to be allowed. But counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint," and are to be allowed: and why? Because "the debt and the security are different contracts." It does not strike me that any real difficulty or inconvenience will be imposed upon the defendants by discharging this rule, for, if a verdict be found for them upon the second count, they will have all the costs. Upon the whole, I am unable to arrive at any other conclusion than that the two counts in question do disclose contracts substantially distinct, and therefore, within the meaning of the rule, are founded upon distinct subject-matters of complaint: and consequently I think the rule that has been obtained on the part of the defendants for striking out one of them, must be discharged.

BOSANQUET, J.—I am of the same opinion. This is an application to the general jurisdiction of the court, to strike out one of two counts, upon a suggestion that they are introduced in apparent violation of the rule of Hilary Term, 4 Will. 4. I am of opinion that they are not apparently founded upon one and the same subject-matter

1838.

JAMES v. BOURNE.

of complaint, and therefore that they are not joined in violation of the rule. No doubt, both counts relate to the conveyance of the same identical goods; but that makes no difference. When these rules were under discussion, I remember the propriety of using the word "transaction" in this place was very much canvassed, but the word was found insufficient for the purpose, and rejected, a preference being given to the expression "subject-matter of complaint." I agree that, if this were the case of a mere difference in the mode of describing the contract in the different counts, both ought not to be allowed. I am not at all disposed to relax the rules. But it appears to me that these two counts are founded upon distinct and different contracts, different acts being contracted to be done in each: the first count being founded on a bill of lading for the conveyance of the goods from Belfast to Dublin and thence to the port of London; the second, after their arrival in London, to carry the same goods to their ulterior destination, for a distinct reward—the second contract to commence only from the time of the completion of the first. The same fact may be the foundation of different subjects-matter of complaint. Various covenants, for example, may be broken by the same act. In *Jenkins* v. *Treloar*, the two counts were held to be introduced in apparent violation of the rule; and I think properly; for, the second count was founded upon a mere misdescription of the same duty as that claimed in the first. Mr. Baron Parke there said he should in that case have been disposed to allow an amendment, if necessary. I should have done the same.

COLTMAN, J.—I am not able to bring my mind to a satisfactory conclusion in this case: but, conceiving that the course they are disposed to adopt will best advance the justice of the case, I defer to the opinions of the rest of the court. I cannot help entertaining considerable

1838.

JAMES v. BOURNE.

doubt whether the introduction of the second count here is not in apparent violation of the rule. I am induced to entertain the opinion I have expressed, by the sixth rule, which provides that the judge shall order the additional count to be struck out, "unless he *shall be satisfied*, upon cause shewn, that some distinct subject-matter of complaint is bonâ fide intended to be established in respect of each count." Here it appears to me to be at least doubtful whether a distinct subject-matter of complaint is bonâ fide intended to be established in respect of each of these counts. At all events, the plaintiff could not be prejudiced by an indorsement, the consequences of which are the penalty which the rules intended to impose where the party fails to establish a distinct subject-matter of complaint or defence in respect of each count, plea, &c. I am unable to reconcile the examples given with a consistent interpretation of the rules. But, although (and I say it with diffidence) I doubt the proper construction of the rule, I agree that the justice of the particular case will be best attained by discharging this rule.

PARK, J.—As this is in effect an appeal from my decision at chambers, though in point of form an application to the general jurisdiction of the court, I deferred giving any opinion until I had heard those of my Lord and my two learned Brothers. When the parties were before me, I inclined to think that the two counts disclosed distinct subjects-matter of complaint, and ought therefore both to be allowed. I proposed that one should be struck out if the defendants would consent that the matters alleged in it should be given in evidence under the other count, or that the declaration might be amended at Nisi Prius, to meet the case as it should present itself there. But the defendants declined to consent; and I refused to make an order. I am clearly of opinion, after the full discussion the case has undergone, that these two counts do contain

each a distinct subject-matter of complaint. It is true, the goods are the same, and the voyage is the same. But, if the loss complained of had not happened at the wharf, but after the goods had been put in motion from the wharf to the plaintiffs' warehouse, the plaintiffs clearly could not recover upon the first count. And it is at least doubtful whether an amendment could be allowed in such a matter. I lament that my Brother Coltman entertains a doubt as to the correctness of this decision.

Rule discharged.

ORAM *v.* PARKER.

Monday, April 30th.

Where the plaintiff's attorney had charged in his bill, and had been paid, for entering satisfaction on the roll, but had omitted to do so—The court, at the instance of the defendant, ordered him to do so at his own cost.

FRANCILLON, on a former day, obtained a rule on the part of the defendant calling upon the plaintiff's attorney to shew cause why the roll should not be carried in by him and at his own expense. It appeared from the affidavit upon which the motion was founded that the defendant was desirous of entering satisfaction upon the roll, but that the plaintiff's attorney, although his bill of costs, including a charge for so doing, had been paid, had omitted to carry in the roll, and now refused to do so without being paid for it.

Martin now shewed cause, referring to a case (not reported) of *De Bastos* v. *Wilmot*, in which Coleridge, J., in 1835, made an order under precisely similar circumstances, directing the attorney to carry in the roll, on payment of costs.

Francillon, in support of his rule, was stopped by the court.

TINDAL, C. J.—The attorney has already been paid for doing that which he is now required to do. I do not see

1838.

ORAM v. PARKER.

any good reason why it should not be done, and at his expense. At the same time, I must observe that the proper course for the defendant to pursue, was, to apply to a judge at chambers, instead of coming to the court. I therefore think the rule should be made absolute *without costs*.

The rest of the court concurring—

Rule absolute accordingly.

Thursday, May 3rd.

An attachment for non-payment of money pursuant to a rule cannot properly issue upon an affidavit of a demand by the plaintiff's attorney, where the money is by the rule made payable *to the plaintiff* only, and there is no power of attorney.

MASON *v.* WHITEHOUSE.

R. V. RICHARDS, on a former day in this term, obtained a rule nisi to set aside an attachment that had issued against the plaintiff for non-payment of costs of the day for not proceeding to trial. The demand had been made by the defendant's attorney—the costs being by the rule made payable *to the defendant*. He cited *Doe* d. *Chippen* v. *Roe*, 1 Scott, 588, n., where a motion for an attachment for non-payment of costs that had been ordered to be paid *to the party*, on an affidavit of a demand made *by his attorney*, was negatived—the Secondary reporting, that, where costs are directed to be paid *to the party*, in order to found an attachment for non-payment, the demand must be made by him, or there must be a power of attorney.

Whateley now shewed cause.—The demand was properly made by the attorney, for "he represents the principal for all the purposes of the suit"—per Parke, B., in *Clark* v. *Dignum*, 3 M. & Welsby, 319; and he has a lien on the costs. Had the rule required the party to pay a sum of money, and not *costs*, there might be ground for the objection. A refusal to pay to the recognized agent of the defendant, the party entitled to receive the costs,

1838.

MASON v. WHITEHOUSE.

was in point of law a refusal to pay the defendant himself.

R. V. Richards, in support of his rule, was stopped by the court.

TINDAL, C. J.—The question is, not whether the defendant's attorney had authority to receive these costs; but whether the plaintiff is in contempt for the disobedience of an order of the court. The words usually inserted to give the attorney authority to make the demand, are here omitted; and no authority has been cited to shew that an attachment can issue against a party for non-payment of costs, where the demand has been made by one not named in the rule or acting under a power of attorney. I think the plaintiff is entitled to have the attachment set aside, with all the costs incident thereto. But I think the justice of the case will be answered by withholding the costs of this application.

The rest of the court concurring—

Rule absolute, without costs.

HUNTLEY *v.* BULMER and Others.

Thursday, May 3rd.

A notice that the defendant intends to move for security for costs by reason of the plaintiff's residence out of the jurisdiction of the court, does not dispense with the necessity of demanding security prior to the motion.

Semble, that the affidavit upon which a motion for security for costs is founded should shew in what stage the proceedings are.

BAYLEY moved for a rule calling upon the plaintiff to shew cause why he should not give security for costs. The affidavit upon which the motion was founded, stated that the plaintiff was resident at St. Omer; and that he had had three days' notice of the application: but it did not appear either that there had been a demand of security and a re-

1838.

HUNTLEY v. BULMER.

fusal (*a*), or in what stage the proceedings were. He submitted, that the notice was equivalent to a demand; and that it was not necessary that the stage of the proceedings should appear on the affidavit in support of the motion—*Jones* v. *Jones*, 2 C. & J. 207, 2 Tyr. 216, 1 Dowl. 313, where the court say: "If the plaintiff is out of the jurisdiction of the court, the defendant is entitled to have security for costs, unless the plaintiff shews by affidavit that the proceedings are in such a stage as to deprive him of that right. The defendant makes the application at his peril, and it rests with the plaintiff to shew that the application is too late."

PER CURIAM.—A notice of motion is not tantamount to a demand of security and refusal. And, notwithstanding the case cited, we are disposed to adhere to the rule laid down in this court in *Lusaletti* v. *Powell*, 1 Marsh. 376, and even since acted upon here, that the affidavit upon which the motion is founded must state in what stage the proceedings are.

Rule refused.

On a subsequent day an affidavit was produced, stating that security had been demanded and refused, and that the time for pleading had not expired; and the rule was granted.

(*a*) See Adams v. Brown, 2 M. & Scott, 154, 9 Bing. 81, 1 Dowl. 273, and the cases there cited.

1838.

Thursday, May 3rd.

PLACE and MEABRY *v.* DELEGAL.

THIS was an action of assumpsit on a contract of indemnity. The first count of the declaration stated, that, before and at the time of the making of the promise of the defendant thereinafter next mentioned, the plaintiffs were the executors of the last will and testament of one John Miers, and an estate called Black Bank had been and was sold under the directions of the plaintiffs as such executors; and before and at the time of the payment by the plaintiffs to the defendant thereinafter next mentioned, the plaintiffs, to wit, as executors as aforesaid, held in their hands certain monies as the produce of such sale; that, upon the death of the said John Miers, one William Miers claimed to be entitled to a certain share of and in the said estate and the proceeds thereof when sold, and the said William Miers became a bankrupt, and a certain commission of bankruptcy, founded on the statutes relating to bankrupts then in force, had been and was awarded against him after the death of the said John Miers and before the making of the defendant's promise thereinafter next mentioned, to wit, on the 23rd April, 1829; and thereupon, before the making of the defendant's promise thereinafter next mentioned, to wit, on the 20th May, 1829, certain persons, to wit, James Chart and Alfred Newman, were appointed and became assignees of the estate and effects of the said William Miers under the said commission; that, before and at the time of the making of the defendant's promise thereinafter next mentioned, the said James Chart and Alfred Newman, as such assignees, claimed to be entitled to and required the plaintiffs to pay to them a certain sum, to wit, the sum of 32*l.* 6*s.* 6*d.*, being in the hands of the plaintiffs as such executors, in respect of the said William Miers's said share of and in the produce of the said estate; that,

The plaintiffs declared upon the following agreement, signed by the defendant:—"Mr. J. E., and also Messrs. P. and M., as the executors of the will of the late Mr. J. M.: In consideration of your having paid me the sum of 32*l.* 6*s.* 6*d.*, in respect of the share of W. M., or of his assignees, in the produce of the estate called B. B., I undertake to indemnify and save you and each of you harmless from any claim that may be made against you in consequence of your having so paid me the said sum of money, whether by the said W. M., or any person claiming through him." J. E. was the attorney of P. and M., and as such had sold the estate, and held the proceeds at the time the above undertaking was given:—Held, that the agreement was properly sued upon by P. and M., without joining J. E.

1838.

PLACE v. DELEGAL.

before and at the time of the making of the defendant's promise thereinafter next mentioned, certain transactions and dealings had taken place between the said William Miers and the defendant, and the defendant also claimed to be and represented to the plaintiffs that he was entitled to receive the said sum of *32l.* 6*s.* 6*d.* of and from the plaintiffs, and then requested the plaintiffs to pay him, the defendant, the said sum of *32l.* 6*s.* 6*d.*; and thereupon, therefore, to wit, on the 26th December, 1834, in consideration of the premises, and that the plaintiffs, at the request of the defendant, had paid to him the said sum of *32l.* 6*s.* 6*d.* in respect of the share of William Miers or his assignees in the produce of the said estate called Black Bank, the defendant then undertook and promised the plaintiffs to indemnify the plaintiffs and save them harmless from and against any claim that might be made against them in consequence of their having so paid the defendant the said sum of *32l.* 6*s.* 6*d.*, whether by the said William Miers or any other person claiming through him; that thereupon, afterwards, to wit, on the 11th February, 1835, by reason of the premises, and in consequence of the plaintiffs having so paid to the defendant the said sum of *32l.* 6*s.* 6*d.*, the said James Chart and Alfred Newman, as assignees of the estate and effects of William Miers as such bankrupt according to the statutes in force concerning bankrupts, and claiming through him, did implead the plaintiffs in an action on promises for the recovery of, amongst other monies, the said sum of *32l.* 6*s.* 6*d.*; and such proceedings were thereupon had in that action that the said James Chart and Alfred Newman, as assignees, afterwards, to wit, in Trinity Term, 1835, by the consideration and judgment of the court, &c., recovered in the same action against the plaintiffs a large sum, to wit, the sum of *32l.* 6*s.* 6*d.*, and also the costs of the said James Chart and Alfred Newman, as assignees, in that behalf, amounting together to a large sum, that is to say

1838.

PLACE v. DELEGAL.

89*l.*, for their damages which they as assignees had sustained as well by reason of the premises as for their costs and charges by them about their suit in that behalf expended, whereof the plaintiffs were convicted, as by the record and the proceedings thereof remaining in the said court fully appeared: by means of which said several premises, they, the plaintiffs, afterwards, to wit, on the 29th July, 1835, were called upon and forced and obliged to pay, and did then necessarily pay and satisfy to the said James Chart and Alfred Newman, as such assignees, the said sum of money so recovered, to wit, the said sum of 32*l.* 6*s.* 6*d.*, and the said costs, amounting together to the said sum of 89*l.*; and thereby also the plaintiffs were obliged to pay and did then pay to the said James Chart and Alfred Newman, as such assignees, other monies, to wit, to the amount of 40*l.*, for other their costs by them incurred in the said action: of all which premises the defendant afterwards, to wit, on &c., had notice: yet the defendant did not nor would, although often requested by the plaintiffs to do so, pay the plaintiffs, or either of them, the said sums of 89*l.* and 40*l.*, or either of them, or any part thereof, and thereby or otherwise indemnify or save harmless the plaintiffs, according to his the defendant's said promise; and by reason of the premises the plaintiffs were damnified to the amount of the said sums of 89*l.* and 40*l.*, contrary to the defendant's said promise.

In the second count the plaintiffs claimed a sum of 19*l.* 9*s.* 10*d.* for the costs of postponing the trial in *Chart* v. *Place*.

The agreement mentioned in the first count was as follows:—

"Mr. John Evans, and also Messrs. Place and Meabry, as the executors of the will of the late Mr. John Miers: In consideration of your having paid to me the sum of 32*l.* 6*s.* 6*d.* in respect of the share of Mr. William Miers, or of his assignees, in the produce of the estate called

1838.

PLACE v. DELEGAL.

Black Bank, I hereby undertake to indemnify and save you and each of you harmless from any claim that may be made against you in consequence of your having so paid me the said sum of money, whether by the said William Miers or any person claiming through him. December 26th, 1834. "C. Delegal."

The cause was tried before Tindal, C. J., at the sittings at Westminster after last Michaelmas Term. The facts that appeared in evidence were as follow:—The plaintiffs were the executors of John Miers; the defendant a merchant in the city, who had married a daughter of the testator. A sum of 32*l.* 6*s.* 6*d.*, William Miers's share of the produce of an estate of the testator called Black Bank, the sale of which had been effected by Evans as the attorney of the plaintiffs, was claimed by the defendant, and also by Chart and Newman as assignees of William Miers, who had become bankrupt. The plaintiffs agreed to pay over the money to the defendant upon his giving them the indemnity above set out. Chart and Newman thereupon brought an action against the plaintiffs, as well to recover the 32*l.* 6*s.* 6*d.*, as also a fourth part of an annuity of 20*l.* per annum to which they alleged the bankrupt was entitled. The defendant had notice of the action, was fully informed of all the particulars, and was consulted upon it throughout; and a case was stated for the opinion of counsel, in which he suggested a certain question, and the opinion when obtained was shewn to him. The action proceeded, and the then plaintiffs, Chart and Newman, obtained a verdict and judgment in respect of both the demands. The present action was thereupon brought, to recover from the defendant upon his agreement, the 32*l.* 6*s.* 6*d.*, and the costs of the action, together amounting to 91*l.* 8*s.* 6*d.*, and also 19*l.* 9*s.* 10*d.*, for costs incurred in postponing the former trial at the defendant's request, or with his assent, on the ground of the absence of a material witness.

1838.

PLACE v. DELEGAL.

The jury returned a verdict for the plaintiffs on both issues, with separate damages—91*l.* 8*s.* 6*d.* on the first count, and 19*l.* 9*s.* 10*d.* on the second.

Talfourd, Serjeant, in the last term, pursuant to leave reserved at the trial, moved that the verdict on the first issue might be entered for the defendant, or the damages thereon reduced to 32*l.* 6*s.* 6*d.*, or for a new trial:—Evans, being a party to the guarantie, ought to have joined in the action, or the action should have been brought in the name of one of the parties only. In 1 Wms. Saund. 154, n. (1), it is said: "The distinction which runs through all the cases is between actions brought *by* one of several covenantees, obligees, or *by* one of several with whom any contract, whether in writing or parol, is made, and actions brought *against* one of several joint covenantors, obligors, or contractors. In the former case the action must be brought by all the parties: for, where there are several covenantees or obligees, and one of them only brings an action, without averring in the declaration that the others are dead, the defendant may either take advantage of it at the trial as a variance upon the plea of non est factum, or pray oyer of the deed and demur generally. So, where an action is brought by one of several with whom any contract has been made, the defendant may take advantage of it upon evidence at the trial upon the plea of non assumpsit; or, if it appears upon the face of the declaration that the contract was made with others as well as the plaintiff, it will be error." The case of a joint and several bond is familiar: and there are many cases to shew, that, where the contract is joint and several, the whole of the parties must be joined, or each must sue in respect of his individual interest. In *Graham* v. *Robertson*, 2 T. R. 282, where the plaintiffs together with A. and B., being owners of one ship, and the defendant of another, a prize was taken, condemned, and

1838.

PLACE v. DELEGAL.

shared by agreement between them; and afterwards the sentence of condemnation was reversed, and restitution awarded, with costs, which were paid solely by the plaintiffs, A. and B. having in the mean time become bankrupts: it was held that an action could not be maintained by the plaintiffs alone for a moiety of the restitutition money and of the costs, because it was either a partnership transaction, when A. and B. ought to be joined, or not, when separate actions should be brought by each of the persons paying. This principle was recognized in *Brand* v. *Boulcott*, 3 B. & P. 235, where A., B., and C., being appointed assignees under a commission of bankrupt, and having acted as such, A. and B. paid each half of his bill to the solicitor, and it was held that A. and B. could not maintain a joint action against C. for his proportion of the money paid, but must each bring a separate action. [*Tindal*, C. J.— The cases cited are cases where all the three parties were *interested:* here, Evans had no interest; he had merely acted as the attorney for the executors. How can the rule apply to such a case?] In *Osborne* v. *Harper*, 5 East, 225, A., B., and C., having dissolved partnership, C., after such dissolution, drew bills in the partnership firm in favour of D., he (D.) not knowing of such dissolution, upon which D. brought his action against all the former partners, and C. having pleaded his bankruptcy, D. entered a nolle prosequi as to him, and recovered judgment against A. and B., which was afterwards satisfied by the attorney of A. and B., who advanced part, and borrowed the rest of the money on their *joint* credit: it was held that the sum so paid in satisfaction of the judgment might be recovered in a *joint* action by A. and B. against C.

With respect to the reduction of damages—inasmuch as the action by Chart and Newman against the present plaintiffs embraced two distinct demands, to one of which only the defendant's indemnity applied, the defendant

1838.

PLACE v. DELEGAL.

ought not to be compelled to pay the entire costs of the defence of that action.

A rule nisi having been granted—

Channell now shewed cause.—The action was properly brought in the name of the two plaintiffs. The former action was substantially an action against Delegal, the present defendant; and the result of that action was not the less a damage accruing to the present plaintiffs through the defendant's default, because it happened that another claim was set up by the then plaintiffs besides that which was contested at the defendant's instance. The defendant had ample opportunity, had he been so minded, to stay the former action as to the *32l.* 6*s.* 6*d.*, by paying that sum, and then the plaintiffs would have proceeded with the defence at their own peril.—It is said that the contract of indemnity here was a joint contract with the plaintiffs and John Evans, and therefore the three should have joined in bringing it. Had this in fact been a joint and several contract with the three, then, it may be conceded, the action, like an action upon a joint and several bond, must have been brought either in the names of the three or severally by each according to his particular interest in the subject-matter: nor is it necessary to dispute the principle laid down by the authorities cited. But this contract is in effect addressed only to *two* parties—to Mr. John Evans, and to the plaintiffs as executors of the will of the late Mr. John Miers. It is addressed to the plaintiffs in their representative character: one of them could not have sued alone. The right to sue must follow the interest; and, where that is clearly joint, the introduction of the words "you and each of you" can make no difference. Chart and Newman might have sued Evans for the *32l.* 6*s.* 6*d.* whilst it remained in his hands, or they might have waited until he paid it over to the executors, and then resorted to them: but no action could at any time

As to the reduction of damages.

As to the maintenance of the action.

1838.

PLACE v. DELEGAL.

have been brought in which the three could properly have been included. The giving the indemnity with the double aspect seems to have been occasioned by the doubt whether the proceedings by William Miers's assignees (Chart and Newman) would be taken against the plaintiffs or against Evans. In *James* v. *Emery*, 8 Taunt. 245, Gibbs, C. J., says: "The principle is well known and fully established, that, if the interest be joint, the action must be joint, although the words of the covenant be several; and, if the interest be several, the covenant will be several, although the terms of it be joint." And in *Withers* v. *Bircham*, 3 B. & C. 254, 5 D. & R. 106, it was held, that, though a covenant be joint in its terms, yet, if the interests of the covenantees be several, each may sue separately for a breach. Abbott, C. J., there said: "Adverting to the authority of the cases collected in the note to *Eccleston* v. *Clipsham*, 1 Wms. Saund. 153, and also to the last case, of *James* v. *Emery*, we are all satisfied, that, where the interest of the party is several, the covenant, although joint in its language, is to be construed severally as to each of the covenantees; and that principle has not been broken in upon by any other case which has been cited."

Talfourd, Serjeant, in support of his rule.—The action by Chart and Newman was brought as well to recover the 32*l.* 6*s.* 6*d.* as to enforce a further demand which they had as assignees of William Miers against the plaintiffs as executors of John Miers. The cause went on to trial, and was defended, and the then plaintiffs established their right in respect of *both* claims. The question is, whether the defendant, who had contracted to indemnify the plaintiffs against *one* only of those demands, ought to be charged with the entire costs incurred in the defence of that action. [*Tindal*, C. J.—The answer to that question will depend upon whether or not the defendant had an opportunity of paying the 32*l.* 6*s.* 6*d.* into court. I think

1838.

PLACE v. DELEGAL.

he was bound to furnish the executors with that sum. After verdict, we are at liberty to say that no judge could have directed the jury to find for the plaintiff, unless satisfied that the defendant was cognizant of the prior action. If the defendant had had no notice of the pendency of that action, the jury never could have found against him.] Suppose the party claiming the annuity in opposition to the assignees of William Miers had been a different person from the now plaintiffs, would that party and the defendant each have been liable for the whole costs, or each only for a proportion? [*Tindal*, C. J.—It is possible, that, if the whole had been recovered against one, that one might have had contribution from the other.] Chart and Newman might have had no claim against Evans individually after he had parted with the produce of the Black Bank estate: but the question here is, what was the position of the parties, and what their relative interests, at the time the indemnity was given. The document clearly points to a joint interest in the three. It must be assumed that there had been a joint payment by the three to the present defendant; and the object of the memorandum was to indemnify the three jointly and severally. The case is very much in principle like *Graham* v. *Robertson*, 2 T. R. 282: there the interest of the parties was joint at the time of the payment, but afterwards became severed. The circumstance of the plaintiffs being described as executors makes no difference: they were not liable in their representative, but in their individual characters only.

As to the parties to the action.

TINDAL, C. J.—The question whether or not the three persons named in the memorandum upon which the first count in this case is framed ought to have joined in bringing the action, will depend upon the relation in which they stood to each other, and the nature of the interest they had in the subject-matter. Looking to the contract alone, it might be too much to say that there is upon the

1838.

PLACE v. DELEGAL.

face of it such a severance of the parties as to enable Place and Meabry to sue alone: but all doubt is removed when we advert to the relation in which they stood to Evans. Evans was the attorney employed to sell the Black Bank estate, in order that the proceeds might be divided pursuant to the will of John Miers, whose executors Place and Meabry were: the relation between them therefore was that of attorney and client, or principals and agent. William Miers being entitled to a share of the proceeds of Black Bank, amounting to *32l.* 6*s.* 6*d.*, for which his assignees put in a claim, and the same being also claimed by the present defendant, the indemnity in question was given by the latter on the money being handed over to him. Now, at the time the money was so paid over to the defendant, and the indemnity given, it was uncertain against whom the assignees of William Miers would resort for the recovery of the share claimed by them: if the money remained in the hands of Evans, he would be the proper defendant in an action at the suit of the assignees: if he had paid it over to the executors, then they would be the proper defendants, and not Evans their agent. To meet therefore this uncertainty as to the party against whom William Miers's assignees might proceed, the indemnity was given, to enure to either. The plaintiffs and Evans stand in totally different positions: they had no joint interest in the subject-matter: the very form of the document (though I agree it does not shew that Place and Meabry were liable to be sued *as executors*) shews that the two parties had distinct interests. Looking at the whole transaction, I think that no action could at any time have been brought that would properly have charged the three, nor could they properly all join in suing upon this contract of indemnity. The rule must, therefore, be discharged.

PARK, J.—I am of the same opinion. The case principally relied upon on the part of the defendant, *Graham* v.

1838.

PLACE v. DELEGAL.

Robertson, is totally different in its circumstances from the present. There, the Trimmer privateer, of which the plaintiffs and two other persons were joint owners, took two prizes, in conjuction with the Maidstone, another privateer, of which the defendant was owner, which prizes were condemned in the Vice-Admiralty Court of Minorca. In pursuance of an agreement between the plaintiffs and defendant to share all prizes, half of the money arising from the sale was paid to the defendant's agent. Afterwards, on appeal to the king in council, the sentence of condemnation was reversed, and the money decreed to be refunded to the appellants, with costs, which was paid by the plaintiffs alone, the other partners having in the mean time become bankrupts. The action was brought to recover a moiety of the sum paid by the plaintiffs. Buller, J., before whom the cause was tried, was of opinion that the plaintiffs, having paid the money on account of a partnership transaction, must be nonsuited, because the other partners or their assignees were not joined: and he accordingly directed a nonsuit. Upon the matter afterwards coming before the court, Ashhurst, J., said: "I am of opinion that this nonsuit is right. There is one decisive answer to all that has been said on the part of the plaintiffs. Either this money was paid by them on the partnership account, or not; if it were, then the other partners who are become bankrupts, or their assignees, should have been joined. If it were not paid on a partnership account, then it stands as a separate payment by each individual of the plaintiffs; and then the sum demanded must be recovered by each in a separate action, they not being partners quoad this transaction. So that, in either case, the action is wrongly conceived." In the present case, Evans was not a real party to the original transaction. The indemnity was addressed "To Mr. John Evans, and also Messrs. Place and Meabry, as the executors of the will of the late Mr. John Miers"—clearly implying a diversity of

1838.

PLACE v. DELEGAL.

interest in the parties thus separately named. Evans could not have been joined.

BOSANQUET, J.—It appears to me that Evans was not jointly interested with the plaintiffs in the subject-matter of this action, and therefore that it was proper to abstain from joining him as a plaintiff. And I think the action was properly brought in the names of Place and Mesbry, they having an interest distinct from any that Evans might have.

COLTMAN, J.—I am of the same opinion. I do not agree that we are to look only at the situation of the parties and the nature of their interests at the time this contract of indemnity was entered into; we must see who are the parties entitled to the damages in this action. There is no pretence for saying that Evans could under any circumstances be entitled to participate in them.—With regard to the costs of the former action, if the present defendant insisted upon that action being defended, or refused to pay the 22*l.* 6*s.* 6*d.*, I think he would clearly be liable for the entire costs of the defence, notwithstanding the action also embraced another cause not covered by the guarantie.

Rule discharged.

HORNE, Executor of WILLIAM DENT, deceased, *v.* REDFEARN.

Friday, May 4th.

THIS was an action for money lent by the deceased in his life-time to the defendant. A case was stated between the parties, pursuant to the statute 3 & 4 Will. 4, c. 42, s. 25, to ascertain the opinion of the court as to whether

"I have received the sum of 20*l.*, which I have borrowed of you, and I have to be accountable for the said sum, with legal interest;"—Held, that this was not a promissory note, but an agreement, and therefore admissible in evidence under a common agreement stamp.

or not the following letter directed and sent by the defendant to the testator on the 28th December, 1829, was admissible in evidence :—

"Sir—I have received the sum of 20*l.*, which I have borrowed of you, and I have to be accountable for the said sum, with legal interest. I am &c.

"Peter Redfearn."

The above was sent or delivered by the defendant to the deceased at the time it bears date. It was not stamped until some years afterwards, when it was stamped with a 1*l.* stamp, on payment of the penalty of 5*l.* On the part of the defendant, it was contended that the document was a promissory note, that it ought to have been stamped at the time it was given, and that the commissioners of stamps had no power to stamp it afterwards.

Knowles, for the plaintiff.—This is not a promissory note: to constitute it a promissory note, the document must contain the word "promise." In *Fisher* v. *Leslie*, 1 Esp. 426, to establish a claim for money lent, the plaintiff offered in evidence a slip of paper, signed by the defendant, in the following words—"I. O. U. eight guineas;" on the part of the defendant it was objected that this was either a promissory note or a receipt, and in either point of view required a stamp: but the Lord Chief Justice was of opinion that it was neither a promissory note nor a receipt, but merely an acknowledgment of the debt. And in *Israel* v. *Israel*, 1 Camp. 499, Lord Ellenborough, upon the authority of *Fisher* v. *Leslie*, held that a written paper containing a bare acknowledgment of a debt, was good evidence under the money counts, without a stamp. There is a material distinction between the words of the document now in question and those of the instrument which in *Morris* v. *Lee*, 2 Ld. Raym. 1396, Str. 629, 8 Mod. 369, was held to be

1838.

HORNE v. REDFEARN.

a promissory note. The introduction there of the words "or order," made the instrument negotiable. But this is clearly nothing more than a mere acknowledgment of a debt: the defendant admits he has received 20*l.*, and that he owes that sum. The memorandum might have been, and probably was given for the purpose of saving the statute of limitations, in which case it would be exempted from stamp duty by the 9 Geo. 4, c. 14, s. 8 (*y*).

W. H. Watson, contrà.—The instrument in question is not an agreement, but a promissory note, and therefore the stamp is improper. An agreement to be accountable for a given sum, is in effect an agreement or promise to pay. Whether the promise be in words or in substance, is immaterial: and there are many cases in the books to shew that the words here used are words of promise. In *Ashby* v. *Ashby*, 3 M. & P. 186, an instrument in these terms—"Received of Mrs. E. Ashby 150*l.*, which we jointly and severally promise to pay on demand, with lawful interest for the same," signed by the defendants, was held to require a promissory note stamp. In *Green* v. *Davis*, 6 D. & R. 306, 4 B. & C. 235, 1 C. & P. 451, which was an action of assumpsit upon an instrument in this form—"Received of B. (the testator) 100*l.*, which I promise to pay on demand, with lawful interest"—it appeared that the instrument was made in 1814 upon a threepenny receipt stamp, and was afterwards stamped with a 1*l.* agreement stamp, the proper stamp for a promissory note of that amount at that time being 3*s.*: it was held that

(*y*) Under this section, the following memorandum—"I acknowledge to owe Mr. James Morris, of Bolton, the sum of 36*l.*, which I agree to pay him as soon as my circumstances will permit me so to do—signed, John Dixon"—was held to be exempt from stamp-duty, as a writing made necessary by that statute, it being put in for the mere purpose of barring the statute of limitations, and the debt itself being proved by other evidence. *Morris* v. *Dixon*, 4 Ad. & E. 845, 6 N. & M. 438.

1838.

HORNE v. REDFEARN.

this instrument was a promissory note, that the three-penny stamp was insufficient, and the 1*l.* stamp illegally added, and therefore the note was not receivable in evidence for any purpose. Bayley, J., in delivering the judgment of the court, said: "No particular form of words is necessary to constitute a note, and *Chadwick* v. *Allen*, 2 Str. 706, is express to shew that the payee needs not be named more explicitly than he is here. The substance of the note there was this: '15*l.* 5*s.* balance due to Sir Andrew Chadwick, I am still indebted, and do promise to pay.' Whom the maker promised to pay was not in terms stated; but, as he named no other payee, whom could he have intended but Sir Andrew Chadwick? So, here, Boaz is the person from whom the money is stated to have been received, and Boaz therefore is the only person to whom it could be intended to repay it." In *Tomkins* v. *Ashby*, 9 D. & R. 543, 6 B. & C. 541, an acknowledgment in this form—"Sept. 15, 1824. Mr. T. has left in my hands 200*l.* J. A."—was held to be receivable in evidence in support of an action for money had and received, without a stamp. There there was no promise at all, but a mere acknowledgment. The provision in the stamp act, 55 Geo. 3, c. 184, referred to by Lord Tenterden in that case, as to accountable receipts, is extremely strong in favor of the present defendant. The legislature has attached a precise meaning to the term "accountable." In *Wheatley* v. *Williams*, 1 M. & Welsby, 533, the plaintiffs and S. had sold a library of books for the defendant, some of which were returned by the purchasers as imperfect. The defendant thereupon wrote to the plaintiffs the following letter, dated the 18th December, 1837:—"I have received the imperfect books, which, together with the cash overpaid on the settlement of your account, amounts to 80*l.* 7*s.*, which sum I will pay in two years:" and it was held that this was a promissory note. In *Brooks* v. *Elkins*, 2 M. & Welsby, 74, an instrument in

1838.

HORNE v. REDFEARN.

the following form—"11th October, 1831. I. O. U. 20*l.* to be paid on the 22nd instant. W. B."—was held to require a stamp either as a promissory note or as an agreement for the payment of money above the value of 10*l.* Parke, B., there observes—"A case may be put very close to this, 'I. O. U. 20*l.*, to be paid on demand.' The question is whether it imports a promise. If it does, it requires a stamp." And, in giving judgment, the Court say—"This is either a promissory note, to constitute which no particular form of words is necessary; or it is an agreement for the payment of money above the value of 10*l.*: and in either view of the case it requires a stamp." It is left in doubt whether the court thought the instrument there a promissory note or an agreement; but it seems clear upon the authorities that it was a promissory note, and nothing else. In *Russel* v. *Langstaffe* and *Peach* v. *Kay*, Bayley on Bills, 6, in the case of a note in these words—"Borrowed of J. S. 10*l.*, which I promise not to pay"—it was held that the negative might be rejected, for that a man could not be allowed to say—I am a cheat, and have defrauded. An undertaking to pay generally, is a promise to pay on demand. In the 55 Geo. 3, c. 184, sched. Part 1, title Receipt, amongst the exemptions from duty, we find the following—"Receipts given for money deposited in the Bank of England, or in the Bank of Scotland, or Royal Bank of Scotland, or in the Bank of the British Linen Company in Scotland, or in the hands of any banker or bankers, to be accounted for on demand, provided the same be not expressed to be received of or by the hands of any other than the person or persons to whom the same is to be accounted for. *But, if with interest, see Promissory Note.*" Turning to title "Promissory Note," we find it provided that "all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum importing that *interest* shall be paid for the

1838.

HORNE v. REDFEARN.

money so deposited," are to be deemed and taken to be promissory notes within the intent and meaning of the schedule. A fortiori must the instrument be a promissory note where it contains a distinct and positive promise of payment. [*Coltman*, J., referred to the following "exemption from the duties on promissory notes"—title Promissory Note in the schedule—"All other instruments bearing in any degree the form or style of promissory notes, but which in law shall be deemed special agreements, except those hereby expressly directed to be deemed promissory notes. But such of the notes here exempted from the duty on promissory notes shall nevertheless be liable to the duty which may attach thereon as agreements or otherwise."] That exemption applies where there is something more than mere matter of promise. The phrase here used—"I have to be accountable for the said sum," means neither more nor less than, "I promise to pay the said sum." *Morris* v. *Lee*, 2 Ld. Raym. 1396, Str. 629, 8 Mod. 369, goes the full length of this case. There the plaintiff sued as indorsee of a note signed by the defendant, whereby the latter promised to be accountable to A. or order for 100*l.* value received. After verdict for the plaintiff, it was objected, on a motion in arrest of judgment, that "this note importing only a promise to be accountable for the money, the defendant is not obliged to pay the money to the person to whom it was first given, or to the indorsee; but may account for it another way, by having laid it out in goods for the party as a factor." But, per Curiam—"There are no precise words necessary to be used in a promissory note or bill of exchange—Rast. 338. Deliver such a sum of money, makes a good bill of exchange. But, if the promissory note is within the intent of the act (3 & 4 Anne, c. 9), it is sufficient, though it does not follow the very words of the act. Now, by the receiving the value, the defendant became a debtor; and, when he promises to be accountable for it to A., it is the same

1838.

HORNE v. REDPEARN.

thing as a promise to pay A. And it is the stronger because it is to be accountable to A. or order, which is the proper expression used in such notes, and mentioned in the act of parliament, where it is intended the note should be indorsable or negotiable. But it would be an odd construction, to expound the word accountable, to give an account, when there may be several indorsees."

TINDAL, C. J.—I think this case may be decided by referring to the provisions of the stamp act, and without the aid of any of the cases that have been cited. The document upon which the question arises is not in terms a promissory note; therefore it is not necessarily a case that falls within the provisions contained in the schedule as to instruments of that nature. But, in order to prevent fraud, it is provided, amongst other things, that "all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum importing that interest shall be paid for the money so deposited," shall be deemed and taken to be promissory notes within the intent and meaning of the schedule. Looking at this instrument, it would seem to fall precisely within this provision, save that the party is not a banker: it is an acknowledgment by a private individual, that he has received a certain sum of money, for which he is to be accountable. Amongst the exemptions from the duties on promissory notes, which immediately follow the above in the schedule, is this:—"All other instruments bearing in any degree the form or style of promissory notes, but which in law shall be deemed special agreements, except those hereby expressly directed to be deemed promissory notes. But such of the notes and instruments here exempted from the duty on promissory notes shall nevertheless be liable to the duty which may attach thereon as agreements or otherwise." The question is whether this may not fairly be held to be an instrument

which is in law to be deemed a special agrement between the parties: it discloses a contract under which the defendant borrows of the plaintiff 20*l.*, for which sum it goes on to say that he is to be accountable—that is, by payment, or set-off, or giving the plaintiff credit for it in an account current between them. It would be a very harsh construction of the act, to hold the document to be a promissory note, after the commissioners of stamps have impressed it with an agreement stamp upon payment of the usual penalty. Still, hard as the case might have been, we must have so held, had we conceived that the act required us so to do.

PARK, J., concurred.

BOSANQUET, J.—I am of the same opinion. I think this instrument must be construed to be a special agreement between the parties, and therefore within the exemption referred to, and not a promissory note. The defendant acknowledges the receipt of a certain sum, and agrees to be accountable for it; the fair and reasonable intendment of which is, that he will give credit for it in account, and, if not overtopped by the items on the debit side, will pay the balance. If it can fairly be construed to be a special agreement, it cannot fall within the description of a promissory note. If it be any thing more than a simple acknowledgment of a debt, with such a promise to pay as the law will imply, then it was liable to the duty of 1*l.* as an agreement.

COLTMAN, J.—The question is whether the instrument set out in the case is or is not a promissory note, and liable to the duty by the stamp act imposed upon promissory notes. It is in form very like an accountable receipt, and, had the provision applied to other persons besides bankers, I should have thought it fell within the descrip-

1838.

HORNE v. REDFEARN.

tion already referred to of instruments that are to be deemed promissory notes within the meaning of the schedule. I am clearly of opinion that it is not liable to duty as a promissory note. Whether or not it was liable to duty as a special agreement, is another question.

Judgment for the plaintiff.

Saturday, May 5th.

A trotting match was made between O. and T. for 1000*l.*, contrary to the statutes. The defendant took a 50*l.* share of O.'s risk, and agreed to let the plaintiff participate in it to the extent of 20*l.* O.'s horse won, and the defendant received the 50*l.* In an action brought by the plaintiff to recover the 20*l.* as money had and received to his use:—Held, that it was not competent to the defendant to set up the illegality of the transaction under non assumpsit.

MARTIN v. SMITH.

THIS was an action of assumpsit for money had and received by the defendant to the plaintiff's use, with a count upon an account stated. Plea—non assumpsit.

The cause was tried before Coltman, J., at the last sitting in Middlesex, in Hilary Term. The facts that appeared were as follow:—A match was made between Messrs. Osbaldiston and Theobald to trot their respective horses, Rattler and Sneezer, a given distance on a turnpike-road, for a wager of 1000*l.* The defendant took a 50*l.* share in the wager on the side of Osbaldiston's horse, and agreed with the plaintiff to let him have two fifths of his risk, viz. 20*l.* Osbaldiston's horse having won, that gentleman received the 1000*l.* from Theobald, and handed over 50*l.* of it to the defendant. The plaintiff brought this action to recover from the defendant 20*l.*, his proportion of the 50*l.*, according to the agreement.

On the part of the defendant it was contended that the action could not be sustained, the demand being for a share of the produce of an illegal wager: for the plaintiff it was submitted that the illegality should have been pleaded, and could not be given in evidence under non assumpsit.

The learned judge inclined to think that it was competent to the defendant under non assumpsit to shew the

illegality of the contract out of which the demand arose. A verdict was taken for the plaintiff for 20*l.*, with a reservation of leave to the defendant to move to enter a nonsuit if the court should think the evidence admissible.

1838.

MARTIN v. SMITH.

Humfrey, in the last term, moved for a rule nisi accordingly. That this is an illegal wager, is clear from *Whaley* v. *Pajot*, 2 B. & P. 51, *Hastelow* v. *Jackson*, 8 B. & C. 221, 2 M. & R. 209, *Shillito* v. *Theed*, 5 M. & P. 303, 7 Bing. 405, and other cases. The only question is, whether the illegality of the transaction could properly be given in evidence under the general issue. By the rule of Hilary Term, 4 Will. 4, Assumpsit, 1, it is provided that "in actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." Ex gr. in an action for money had and received, the plea of non assumpsit will operate "as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff:" that is, a receipt which by the law of this country is a receipt to the use of the plaintiff. There is nothing in any of the rules to prevent the defendant in this case from giving in evidence any state of facts whence the law will raise an inference that the money was not received to the use of the plaintiff. [*Bosanquet*, J.—Where the facts if pleaded would be in confession and avoidance, they must be specially pleaded. Is not that so here? The defendant admits the receipt of the money; but contends, that, by reason of the illegality of the circumstances under which it was received, it was not money had and received to the use of the plaintiff. I think this case is exactly met by the third section, which provides that, "in every species of assumpsit, all matters in confession

1838.

MARTIN v. SMITH.

and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; ex. gr. infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law," &c. &c.] In *Solly* v. *Neish*, 2 C. M. & R. 355, 5 Tyr. 625, 4 Dowl. 248, to an action of assumpsit to recover 5,000*l.* for money had and received, the defendant pleaded, as to the sum of 5,000*l.* in the declaration mentioned, stated to have been received by the defendant to the plaintiffs' use, that the money so received by the defendant was the amount of the proceeds of the sale of goods consigned to him by Messrs. P. & C. as their own goods, with the plaintiff's knowledge and assent (but which, in fact, were the goods of P. & C. and the plaintiffs jointly), as a security for any money the defendant might advance to P. & C., with power of sale to reimburse himself such advances; and that he, not knowing that the plaintiffs had any interest in the goods, made advances to P. & C. to the amount of 6,000*l.*, on the security of the goods, which he afterwards sold: and it was held that this plea would have been bad if specially demurred to, as amounting to the general issue.

Martin now shewed cause.—The match in question not being a race legalized by the statutes 13 Geo. 2, c. 19, and 18 Geo. 2, c. 34, it must be conceded that it was a wager made void by the 9 Anne, c. 14. Still, the money having been received, the plaintiff is entitled to recover upon his contract, independently of any illegality in the transaction out of which it arose. In *Tenant* v. *Elliott*, 1 B. & P. 3, the defendant having received money to the use of the plaintiff on an illegal contract between the plaintiff and a third person; it was held that he could not set up the illegality of the contract as a defence in an

action for money had and received. So, in *Farmer* v. *Russell*, 1 B. & P. 296, it was held, that, if A. receive money of B. to the use of C., it may be recovered by C. in an action for money had and received, though the consideration on which B. paid it was illegal. Buller, J., there says: "I think the knowledge and participation of the defendant is not made out by the evidence reported; nor, indeed, if it had been, would it have made any difference in the case of an action for money had and received, which is not founded on the illegal contract, but on a ground totally distinct from it—*Walker* v. *Chapman*, cited Doug. 471. It seems to me that all the confusion in this case has arisen from the plaintiff having proved too much at the trial. He should have shewn that the defendant had received so much money to his use, and it was immaterial whether the money was paid on a legal or an illegal contract." And Heath, J., said: "The distinction is, that, whether the consideration be good or bad, a man may recover his own money, though not that of another person (*x*)." The present case cannot be distinguished from these. [*Bosanquet*, J.—In *Simpson* v. *Bloss*, 7 Taunt. 246, it was held that the test whether a demand connected with an illegal transaction is capable of being enforced at law, is, whether the plaintiff requires any aid from the illegal transaction.—*Tindal*, C. J.—Suppose the contract had been stated at length in the declaration, would it not have shewn that the plaintiff had been party to an illegal bet? It appears to me that the plaintiff could only shew that this was money received by the defendant to his use, by unrolling the whole transaction, and shewing its illegality.]

(*x*) See M'Kinnell v. Robinson, 3 M. & Welsby, 434, where it was held, contrary to some of the authorities upon which the case last cited proceeded, that money lent for the purpose of gaming, and of playing with at an illegal game, such as hazard, cannot be recovered back.

1838.

MARTIN v. SMITH.

At all events, it was not competent to the defendant to take advantage of the illegality upon the present state of the record. The case is expressly provided for by the rule already referred to—Assumpsit, 3. If the transaction out of which the demand arises be illegal, it is made so by statute, and should have been specially pleaded. [*Tindal*, C. J.—The difficulty is, that the illegality appears here upon the plaintiff's own shewing: you cannot establish your case without setting up the illegal agreement.] A contract by a married woman is clearly and absolutely void; and yet coverture cannot be set up as a defence under non assumpsit. *Solly* v. *Neish* has no application whatever. In *Potts* v. *Sparrow*, 1 Scott, 578, 1 New Cases, 594, 3 Dowl. 630, in assumpsit by an attorney to recover his bill of costs for preparing a deed, and also costs of an action instituted in pursuance of that deed, in which action his client had failed in consequence of the deed having been held void on the ground of maintenance: it was held that the defendant could not set up the illegality of the contract in answer to the action under a plea of non assumpsit. And Tindal, C. J., said, "I never heard, that, if a defendant neglected to set up usury as a defence, the court was bound to discover it for him."

Humfrey, in support of his rule.—The question turns upon the first rule, which provides, that, in actions of this sort, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law; that is, it puts in issue all the facts that are necessary to make the receipt of the money a receipt of money to the use of the plaintiff. The third rule relates only to matters in confession and avoidance, which this is not—it confesses nothing, it avoids nothing. In the case of coverture of the plaintiff,

1838.

MARTIN v. SMITH.

the money would in point of law be money received to the use of the husband; in such case the defendant would not be bound to plead the plaintiff's coverture. [*Tindal*, C. J.—There the plaintiff fails in point of fact.] In *Shearwood* v. *Hay* and *Wills* v. *Langridge*, 5 Ad. & E. 383, the court of King's Bench held, that, in an action brought since the rules of Hilary Term, 4 Will. 4, for medicines furnished and work done by the plaintiff as an apothecary, the plaintiff is liable to be nonsuited under the statute 55 Geo. 3, c. 194, s. 21, if he fail to prove his certificate, or that he was in practice before the 5th August, 1815, although the defendant has pleaded non assumpsit only. And the court of Exchequer, acting upon the authority of the above decision, held the same this morning, in a case of *Wagstaffe* v. *Sharpe*, 3 M. & Welsby, 521, 6 Dowl. 566. [*Bolaiquet*, J.—These cases are quite beside the new rules. They turned upon the very remarkable words of the statute—"No apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the trial that he was in practice as an apothecary prior to or on the 5th August, 1815, or that he has obtained a certificate to practise as an apothecary, from the master, wardens, and society of apothecaries."] In *Potts* v. *Sparrow*, the matter relied on as a defence would in a plea have amounted to matter of confession and avoidance.

TINDAL, C. J.—I incline to the opinion that the objection set up on the part of the defendant to the plaintiff's right to maintain the action, becomes at last a mere objection to the legality of the consideration, and ought, according to the proper construction of the new rules, to have been pleaded specially. The general rule is thus laid down in s. 1, title *Assumpsit*: "In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate

1838.

MARTIN v. SMITH.

only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." A broad distinction is here made between actions of assumpsit brought upon express contracts or promises, and actions brought upon contracts or promises implied by law—non assumpsit, in the former, putting in issue the mere fact of the express contract or promise alleged; in the latter, the matters of fact from which the contract or promise alleged may be implied by law. And this view is strengthened by the examples that are given—"In an action of indebitatus assumpsit for goods sold and delivered, the plea of non assumpsit will operate as a denial of the sale and delivery in point of fact." Suppose, in an action of assumpsit for goods sold and delivered, it should appear upon the evidence that the plaintiff had been active in delivering the goods for the purpose of their being smuggled; could it be contended for a moment that the defendant might avail himself of that fact as a defence to the action, without pleading it specially? The next example is—"In the like action for money had and received, it (non assumpsit) will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff"—a denial of the existence of those facts which make the receipt of the money by the defendant a receipt to the use of the plaintiff: not an allegation of the existence of facts that would shew that the receipt of the money was not in point of law a receipt to the use of the plaintiff. And we must couple that with what is laid down in the third rule—"in every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded: and, among the examples given, is—"illegality of consideration either by sta-

tute or common law." The defence here attempted to be set up, is, illegality of consideration by statute. Taking it, therefore, both upon the first rule, which points out what shall be in issue under non assumpsit, and upon the third, which defines the several defences that shall be specially pleaded, it seems to me that the fair inference is, that the defence in the present case, importing an illegality of consideration by statute, ought to have been put upon the record in the form of a special plea. The case put in the course of the argument, of coverture of the plaintiff, is manifestly distinguishable; for, the moment the fact of coverture appears, the existence of the facts which make the receipt by the defendant a receipt to the use of the plaintiff is negatived; it is the same as if the money were received to the use of a stranger.

PARK, J.—This being the first time this precise question has arisen, it is desirable that the rule should be well understood. It seems to me that the matter has been very clearly and satisfactorily explained by the Lord Chief Justice. The words of the 1st section of this branch of the rules are too general to be restrained. The exception of actions upon bills of exchange and promissory notes, shews that the rule was intended to embrace every other species of action. The great object of the rules was, that parties should have notice of what they were coming to contest. Illegality of consideration by statute is expressly and in terms provided for by section 4, which requires it to be pleaded specially. I do not say that this case is governed by *Potts* v. *Sparrow*, though it to a certain extent applies. I concur with my lord in thinking that this rule must be discharged.

BOSANQUET, J.—I also am of opinion that this defence could not be given under non assumpsit, but should have been pleaded specially. The defence in substance is,

1838.

MARTIN v. SMITH.

that the contract was void in point of law. These rules have been so ably explained by the Lord Chief Justice, that it is only the great importance of the subject that induces me to feel myself justified in adding anything. The great object of the pleading rules undoubtedly was, to enable the plaintiff to ascertain what he was to prepare himself to meet at the trial: and this object could only be attained by requiring that the defence should appear upon the record. And that applies very strongly to this case, where, though the receipt of the money gives rise to an implied promise at common law, it is said, that, the transaction being by statute declared illegal, no implied promise can arise. The first rule provides, that, in actions on express contracts (except on bills of exchange and promissory notes), non assumpsit shall operate only as a denial in fact of the contract or promise alleged; and, in actions on implied contracts, of the matters of fact from which the contract or promise alleged may be implied by law; and the last instance given, as to the operation of the plea of non assumpsit in actions for money had and received, seems to me to preclude all doubt. Prima facie, do the facts here make the receipt of the money by the defendant a receipt to the use of the plaintiff? Undoubtedly they do so, unless it be shewn that the implied contract is rebutted by some law. Then comes the third rule, which provides, that, "in every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." So that, if the defendant mean to rely on any illegality in the transaction, it must be put upon the record. One of the examples given, is, "illegality of consideration either by statute or common law." What is the defence here, but that the consideration is declared illegal by a statute? The rule requires that that defence be pleaded.

1838.

MARTIN v. SMITH.

COLTMAN, J.—When the question arose at the trial, the first rule, taken by itself, appeared to me to afford some ground for the argument urged on the part of the defendant. But, on reference to the third rule, I was of opinion both should be taken together: and I still retain that opinion. If the defendant means to rely on illegality of consideration, he must plead it. In the case put of the plaintiff's coverture, no promise could be implied by law, that the money received was received to the plaintiff's use.

Rule discharged.

ANNE YOUNG *v.* MANTZ.

Monday, May 7th.

In covenant for non-repair of premises demised, it is competent to the defendant to shew the general state and condition of the premises at the time of the demise, but not to go into matters of detail.

THIS was an action of covenant for non-repair and non-payment of rent. Plea—performance.

The cause was tried before Coltman, J., at the Sittings in London during the present term. It appeared that the premises in question, which were situate at Walthamstow, and consisted of a house, barn, and outbuildings, were let to the defendant in 1830, on lease for fourteen years, determinable at the expiration of seven years; that the lease was determined at Midsummer, 1837; and that the house was composed of lath and plaster, and was a very ancient one. The plaintiff put in a specification of the wants of repair, which her witnesses estimated at 155*l.*

The defendant's counsel proposed to ask the plaintiff's surveyor the following question—"Did not some of these defects exist in and prior to the year 1830?" This question being objected to, it was then proposed thus—"Can you say what particular parts of these wants of repair arose during the term?" This being also objected to, the learned judge ruled that these questions could not be put: he said he would allow inquiry to be made generally as to the state of the premises (as, that the house was old and dilapidated) at the time the defendant entered, but

1838.

YOUNG v. MANTZ.

would not allow the defendant's counsel to examine as to particular defects. On further examination, the witness stated, that, in estimating the value of the dilapidations, he took into consideration the age of the premises.

The jury having returned a verdict for the plaintiff—damages 55*l.*—

Byles, on a former day, obtained a rule nisi for a new trial, on the ground of the improper exclusion of evidence.

A'Beckett, contrà, was stopped by the court.

Byles and *Hindmarch*, in support of the rule.—When a man takes a lease with a covenant to keep the premises in repair, the covenant he enters into must necessarily have reference to the state of the premises at the time his tenancy commences. In *Gutteridge* v. *Munyard*, 7 C. & P. 129, 1 M. & Rob. 334, it was ruled, that, where a very old house is demised with the usual covenants to repair, it is not meant that the house should be restored in an improved state, or that the consequences of the elements should be averted; but that the law imposes upon the tenant the duty of *keeping the house in the state in which it was at the time of the demise*, by the timely expenditure of money and care. And Tindal, C. J., said: "Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about, in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord." That was precisely what the questions here proposed pointed at. [*Tindal*, C. J.—You were not prevented from putting questions tending to

1838.

YOUNG v. MANTZ.

shew generally the state of the premises at the commencement of the term. You cannot be allowed to inquire as to the absence of a brick or a tile.] In *Wright* v. *Goddard*, at the last Norfolk Assizes, Parke, B., the case being precisely the same, notwithstanding the course was objected to, ruled that the defendant's counsel was at liberty to go into the state of the repairs both generally and specifically(a). Were we not at liberty here to inquire what of the defects schedaled were the result of the want of seasonable repair, and what the natural result of the march of time and the seasons? And how could this be ascertained without some such inquiry as was proposed and rejected? Was it not competent to us to inquire what was the state of the roof? [*Tindal*, C. J.—You had the whole effect of your questions by shaping the inquiry more generally. You were only excluded from going into minute particulars.] Amongst other things with the rebuilding of which the defendant is charged, was a wall that had been removed as the result of a mere trespass: was it not competent to us to inquire whether that wall had not been pulled down before the defendant entered? If the defendant was not at liberty to go into the particulars, how were the jury to ascertain whether or not the witness had formed a correct estimate? It was admitted at the trial, that, if the general question had been put by the plaintiff's counsel, we would have been at liberty on cross-examination to put the particular questions, with a view to try the credit of the witness.

TINDAL, C. J.—I see no reason for disturbing this verdict. The ground upon which a new trial is asked, is, that the defendant's counsel were precluded from putting certain questions to one of the plaintiff's witnesses. The questions proposed to be put were these—"Did not some

(a) There the plaintiff had a verdict. See the report of a motion on other points, 3 Ner. & P. 361.

1838.

Youde v. Mantz.

of these defects exist in and prior to 1830?" and—"Can you say what particular parts of these wants of repair arose during the term?" The learned judge refused to allow these questions to be put; but he permitted the defendant's counsel to examine the witness generally as to the state of the premises at the time the lease was granted. I think the learned judge did perfectly right; and that the defendant in effect had all the advantage from such general examination which he could have had from the specific questions. The covenant was the usual covenant to keep the premises in good and tenantable repair, and to surrender them at the end of the term in the like tenantable condition, reasonable wear and tear excepted. The meaning of such a covenant is very well understood to be, good and tenantable repair, regard being had to the age of the premises in point of age: the landlord is not to have at the end of the term a new house at the tenant's expense. That is all that was intended to be laid down in *Stanley* v. *Towgood*, 3 Scott, 818, 3 New Cases, 4. It seems to me to be clear that justice has been done between the parties. The value of the dilapidations, according to the evidence of the plaintiff's surveyor, was 155*l.*, and the jury have only given 55*l.*; having evidently been influenced by the antiquity of the building.

PARK, J., and BOSANQUET, J., concurred.

COLTMAN, J.,—I agree that, in the construction of the covenant to repair, regard must be had to the actual state of the premises at the commencement of the term. Some general inquiry therefore is allowable: but the defendant is not to be permitted to pursue the inquiry to the minuteness contended for in this case. The rule is rather one of convenience and good sense, as mitigating the extreme rigour of the covenant, than a matter of strict law.

Rule discharged.

1838.

Monday, May 7th.

WOOF *v.* HOOPER.

To an action of assumpsit the defendant pleaded—non assumpsit—payment—and a set-off. The cause was referred to an arbitrator who was to have power to certify for whom, and for what amount, if any, the verdict should be entered. No evidence was offered before the arbitrator in support of the second and third pleas; but, the plaintiff failing to establish his claim, the arbitrator directed a general verdict to be entered for the defendant:—The court sent the matter back to the arbitrator, that the verdict might be entered according to the evidence.

THIS was an action of assumpsit for work and labor, money had and received &c., and money due on an account stated. The defendant pleaded non assumpsit, payment, the statute of limitations, and a set-off. The cause came on for trial before Gurney, B., at the last Assizes at Worcester, when a verdict was, by consent taken for the plaintiff, damages 500*l.*, subject to a reference of "the cause and all matters in difference between the parties," the arbitrator to make his award or certificate thereon; and it was provided, that, "if the arbitrator should find that the plaintiff was not entitled to recover any damages at all, then the above mentioned conditional verdict was to be void, and instead thereof a verdict was to be entered for the defendant." The parties went before the arbitrator; the plaintiff failed to establish any part of his demand; but the defendant, on whom was the affirmative of the issues joined on the pleas of payment and set-off, offered no evidence. The arbitrator, by his certificate, directed that a verdict should be entered generally for the defendant.

Talfourd, Serjeant, on a former day in this term, obtained a rule calling upon the defendant to shew cause why the certificate should not be set aside, or why it should not be referred back to the arbitrator to be amended, by entering the verdict for defendant on the first and third, and for the plaintiff on the second and fourth issues.

R. V. Richards, now shewed cause.—Under the order of Nisi Prius, the arbitrator had no power to make a certificate in any other form than he has done: he could only direct the verdict to be entered generally for the one

1838.

WOOLF v. HOOPER.

party or the other; a certificate in the form suggested would have been clearly bad, as not warranted by the terms of the order. If it had been intended that the arbitrator should have power to direct the verdict to be entered separately on each issue, a stipulation to that effect should have been inserted in the order.

Talfourd, Serjeant, in support of his rule.—A reference of a cause is substantially a reference of each and every issue in the cause. The true meaning of this order is, that the arbitrator should find for the one party or the other upon each particular issue, according to the evidence brought before him. The arbitrator should have found for the defendant on the general issue and on the issue taken on the plea of the statute of limitations. And he should have gone on to dispose of the other two issues. Suppose this had been an action of trespass, involving questions as to various rights of way, could it be contended, that, if the defendant established the right claimed by him in one of his pleas, the verdict must be directed to be entered for him generally, because the order of Nisi Prius made no mention of the other specific issues?

TINDAL, C. J.—I cannot help thinking that the good sense of the thing and the law in this case are both with the plaintiff. The cause is referred and the damages are referred; and a general power is given to the arbitrator to review them. I think that must be taken secundum subjectam materiem; and that the arbitrator was put in the place of the jury, and had power to direct the entry of the verdict as a jury might have done. As, therefore, there are in this case pleas of payment and set-off upon which no evidence was offered by the defendant before the arbitrator, the plaintiff is entitled to have the verdict entered for him upon those issues.

The rest of the court concurring—

Rule absolute.

1838.

Monday, May 7th.

HARRISON *v.* HEATHORN and TAIT.

THE replication in this case was delivered on Wednesday, the 11th April, and a demurrer thereto on Wednesday, the 18th.

The delivery of a demurrer is a "proceeding" within the meaning of the rule of Easter Term, 2 Will. 4, which provides that "the days between Thursday next before and the Wednesday next after Easter Day, shall not be reckoned or included in any rules or notices or other *proceedings*, except notices of trial and notices of inquiry, in any court of law at Westminster;" and that rule is still in force.

W. H. Watson obtained a rule nisi to set aside the demurrer, on the ground that it was delivered too late.

Crompton shewed cause.—The sole question is, whether or not the days of Easter are days upon which pleadings can be delivered. The replication was delivered on Wednesday, the 11th April; the 15th was Easter Sunday; consequently the days between the 12th and 17th were by the rule of Easter Term, 2 Will. 4, dies non. That rule provides "that the days between Thursday next before and the Wednesday next after Easter Day, shall not be reckoned or included in any rules or notices, or other proceedings, except notices of trial or notices of inquiry, in any of the courts of law at Westminster." It has been held that these intervening days are not to be reckoned in notices of justification of bail (*Cumming* v. *Pullen*, 1 Scott, 538), or in the days allowed for pleading—*Blackburn* v. *Peat*, 2 Dowl. 293, 2 C. & M. 244; *Charnock* v. *Smith*, 3 Dowl. 607. By the 2 Will. 4, c. 39, s. 11, it is enacted, "that, if any writ of summons, capias, or detainer issued by authority of that act shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as thereinafter provided, be had thereon without delay at the expiration of *eight days* from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation, provided, that, "if the last of such eight days shall happen to fall on any day between the Thursday next before and the

1838.

HARRISON v. HEATHORN.

Wednesday after Easter Day, then in every such case the Wednesday after Easter Day shall be considered as the last of such eight days." It clearly was the intention of the legislature and of the judges, that no business whatever (except as is excepted in the rule) should be transacted on those days.

W. H. Watson, in support of his rule.—The sole object of the proviso in the statute 11 Geo. 4 & 1 Will. 4, c. 70, s. 6, "that, if the whole or any number of the days intervening between the Thursday before and the Wednesday next after Easter Day shall fall within Easter Term, there shall be no sittings in banc on any of such intervening days," was, that the public business of the courts should cease to be transacted on those days. In *Hall* v. *Welchman*, 2 C. & J. 472, and *Lilly* v. *Gomperts*, 1 Dowl. 376, the court of Exchequer refused to set aside writs of quo minus made returnable on the intervening days. [*Tindal*, C. J.—By the 2 Will. 4, c. 39, s. 11, it would seem to have been considered that the return of writs was the only matter which by the rule was left in doubt]. The legislature must have considered that a return within the days of Easter would have been good. Provision is there made respecting the delivery of pleadings between the 10th August and the 24th October, but none as to the days of Easter.

TINDAL, C. J.—The statute 2 Will. 4, c. 39, having passed since the promulgation of the rule of Easter Term, 2 Will. 4, it becomes necessary to see whether or not the statute has in any degree altered the provisions of the rule. The only section in the statute that seems to have any bearing upon the subject, is the 11th; and that applies to writs only, and to no other proceeding. The rule therefore is left untouched. Its terms are very general and comprehensive—"It is ordered that the days between Thursday next before and the Wednesday next after

1836.

HARRISON v. HEATHORN.

Easter Day, shall not be reckoned or included in any rules or notices or *other proceedings*, except notices of trial or notices of inquiry, in any of the courts of law at Westminster." Is not the delivery of a demurrer a "proceeding" in a cause? I think it is. The defendant had here four days from the 11th to deliver his demurrer: that would bring it to the 15th—Easter Sunday. He clearly could not be required to deliver it on the 12th: he was therefore in time on Wednesday, the 13th. This rule must be discharged, and the costs will be costs in the cause.

PARK, J., concurred. BOSANQUET, J., was absent.

COLTMAN, J.—Before the passing of the 2 Will. 4, c. 39, where the writ was returnable within four days of the end of any term, the defendant was entitled to an imparlance. To remedy this specific inconvenience, the 11th section enacts, "that, if any writ of summons, capias, or detainer issued by authority of that act shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as hereinafter provided, be had thereon, without delay, at the expiration of eight days from the service or execution thereof, or whatever day the last of such eight days may happen to fall, whether in term or vacation;" and provides, that, "if the last of such eight days shall happen to fall on any day between the Thursday before and the Wednesday after Easter Day, then in every such case the Wednesday after Easter Day shall be considered as the last of such eight days." It was not intended by this enactment to alter the course of any other proceedings in a cause; and the delivery of any pleading is clearly a proceeding within the meaning of the rule of Easter Term, 2 Will. 4.

Rule discharged.

1838.

WOODS v. HOOPER.

party or the other; a certificate in the form suggested would have been clearly bad, as not warranted by the terms of the order. If it had been intended that the arbitrator should have power to direct the verdict to be entered separately on each issue, a stipulation to that effect should have been inserted in the order.

Talfourd, Serjeant, in support of his rule.—A reference of a cause is substantially a reference of each and every issue in the cause. The true meaning of this order is, that the arbitrator should find for the one party or the other upon each particular issue, according to the evidence brought before him. The arbitrator should have found for the defendant on the general issue and on the issue taken on the plea of the statute of limitations. And he should have gone on to dispose of the other two issues. Suppose this had been an action of trespass, involving questions as to various rights of way, could it be contended, that, if the defendant established the right claimed by him in one of his pleas, the verdict must be directed to be entered for him generally, because the order of Nisi Prius made no mention of the other specific issues?

TINDAL, C. J.—I cannot help thinking that the good sense of the thing and the law in this case are both with the plaintiff. The cause is referred and the damages are referred; and a general power is given to the arbitrator to review them. I think that must be taken secundum subjectam materiem; and that the arbitrator was put in the place of the jury, and had power to direct the entry of the verdict as a jury might have done. As, therefore, there are in this case pleas of payment and set-off upon which no evidence was offered by the defendant before the arbitrator, the plaintiff is entitled to have the verdict entered for him upon those issues.

The rest of the court concurring—

Rule absolute.

1838.

Monday, May 7th.

HARRISON *v.* HEATHORN and TAIT.

THE replication in this case was delivered on Wednesday, the 11th April, and a demurrer thereto on Wednesday, the 18th.

The delivery of a demurrer is a "proceeding" within the meaning of the rule of Easter Term, 2 Will. 4, which provides that "the days between Thursday next before and the Wednesday next after Easter Day, shall not be reckoned or included in any rules or notices or other *proceedings*, except notices of trial and notices of inquiry, in any court of law at Westminster;" and that rule is still in force.

W. H. Watson obtained a rule nisi to set aside the demurrer, on the ground that it was delivered too late.

Crompton shewed cause.—The sole question is, whether or not the days of Easter are days upon which pleadings can be delivered. The replication was delivered on Wednesday, the 11th April; the 15th was Easter Sunday; consequently the days between the 12th and 17th were by the rule of Easter Term, 2 Will. 4, dies non. That rule provides "that the days between Thursday next before and the Wednesday next after Easter Day, shall not be reckoned or included in any rules or notices, or other proceedings, except notices of trial or notices of inquiry, in any of the courts of law at Westminster." It has been held that these intervening days are not to be reckoned in notices of justification of bail (*Cumming* v. *Pullen*, 1 Scott, 538), or in the days allowed for pleading—*Blackburn* v. *Peat*, 2 Dowl. 293, 2 C. & M. 244; *Charnock* v. *Smith*, 3 Dowl. 607. By the 2 Will. 4, c. 39, s. 11, it is enacted, "that, if any writ of summons, capias, or detainer issued by authority of that act shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as thereinafter provided, be had thereon without delay at the expiration of *eight days* from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation, provided, that, "if the last of such eight days shall happen to fall on any day between the Thursday next before and the

1838.

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TINDAL, C. J.—I cannot help thinking that the good sense of the thing and the law in this case are both with the plaintiff. The cause is referred and the damages are referred; and a general power is given to the arbitrator to review them. I think that must be taken secundum subjectam materiem; and that the arbitrator was put in the place of the jury, and had power to direct the entry of the verdict as a jury might have done. As, therefore, there are in this case pleas of payment and set-off upon which no evidence was offered by the defendant before the arbitrator, the plaintiff is entitled to have the verdict entered for him upon those issues.

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1838.

WOODS v. HOOPER.

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1838.

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1838.

PAWLE v. GUNN.

bargain had been made for hops to the amount of above 10*l.* in money, without writing or earnest; surely such contract had been void; besides, this was most plainly within the meaning and mischief of the statute, which intended to prevent rash and precipitate bargains for above the value of 10*l.*, and to restrain such bargains as were of value to the circumstances either of paying earnest or reducing them to writing—fifthly, it was insisted that Lord Cowper had determined such a contract for stock to be within the statute of frauds, and that, if it exceeded 10*l.*, the same ought to be in writing, in regard stocks are goods and merchandizes within that statute. On the other hand, it was said, that, whereas the statute enacts that no contract should be good for the sale of goods, wares, and merchandizes of 10*l.* price, unless part of the goods be delivered or earnest paid, or a note in writing, this shewed that such goods were intended as were capable of *an actual delivery*, something that was corporeal, and not stock, which was incorporeal, nor was there any such thing as York Buildings stock at that time." But the Lord Chancellor said: "This question was before all the judges of England, who were equally divided upon it, six against six (*Pickering* v. *Appleby*), and therefore it is a point too difficult for me to determine upon a demurrer. It is considerable, that, after one Wolstenholm was declared a bankrupt as having East India stock, this was reversed by an act of parliament (13 & 14 Car. 2, c. 24), declaring that neither he nor any other person should be liable to bankruptcy in respect of their having East India stock, so that stocks or the dealing in them will not make a man liable to bankruptcy, nor do they seem to be wares, goods, or merchandizes within the intent of that clause." The point has never been mooted since. A transfer of stock is a mere transfer of an interest in the debt of the government—a mere chose in action. Foreign stock was not known at the time of the passing of the statute of

frauds (c); and debts, whether by bond or otherwise, though comprehended under the word "chattels" in the bankrupt acts and acts against embezzlement, do not fall within the description of "goods, wares, and merchandizes" in the 29 Car. 2, c. 3, s. 17. As choses in action, they cannot even be assigned.

Cowie, in support of his rule.—The main question here is whether or not stock is within the statute of frauds, 29 Car. 2, c. 3, s. 17. The act is remedial, and the words very general. In *Calye's* case, 8 Rep. 33. a., it was held that the inkeeper's liability extends to all moveable goods, although of them felony cannot be committed, as of charters, evidences, obligations, deeds, specialties, &c. In *Ford* and *Sheldon's* case, 12 Rep. 1, it was resolved that personal actions were included in the word "goods," in the statute against recusants, 29 Eliz. c. 6, as well as goods in possession. In *York* v. *Twine*, Cro. Jac. 78, it was held that an annuity for years, being in the nature of a rent-charge, was liable to be seised under a fi. fa. In *Clayton* v. *Andrews*, 4 Burr. 2101, executory contracts for goods were held not to be within the statute of frauds. Choses in action have been held to be included under the words "goods and chattels" in the statutes relating to bankrupts—*Ryall* v. *Rowles*, 1 Vez. Sen. 348; *Longman* v. *Tripp*, 2 N. R. 70; *Hornblower* v. *Proud*, 2 B. & A. 327; *Cumming* v. *Baily*, 4 M. & P. 36, 6 Bing. 363. The statute of frauds, being a remedial statute, is to be construed liberally—*Rondeau* v. *Wyatt*, 2 N. R. 63; *Garbutt* v. *Watson*, 1 D. & R. 219, 5 B. & A. 613; *Smith* v. *Surman*, 4 M.

(c) It may be that England had no funded debt at the time of the passing of the statute of frauds, 1676; but *foreign* stocks could scarcely have been unknown at that time, seeing that the practice of funding had been used in the Venetian and Genoese states in the preceding century.

The earliest creation of English stock seems to have been by the statute 5 William & Mary, c. 20, the act under which the Bank of England was first incorporated.

1838.

PAWLE v. GUNN.

& R. 455, 9 B. & C. 561. Bond debts have been held to be within the word "goods" in the statutes 17 Edw. 2, c. 10, and 31 Edw. 3, c. 11—*Bullock* v. *Dodds*, 2 B. & A. 276. And in *Mussell* v. *Cooke*, Pre. Ch. 533, South Sea stock was held to be within the statute of frauds. The common law reason why choses in action were not transferable can have no application to a case like the present. There is nothing before the court upon these pleadings to shew that the bonds in question are choses in action, or incapable of sale. That they pass by delivery, is clear—*Heath* v. *Hall*, 4 Taunt. 326: and indeed there was express evidence here to that effect.

In no case can a party recover as for money paid by him to the use of another, unless the payment be of a debt for which he himself was liable (in which case the law will imply a request), or the payment is made at the *express request* of the defendant—*Spencer* v. *Parry*, 4 N. & M. 770, 3 Ad. & E. 331.

TINDAL, C. J.—This is an action of assumpsit for money paid by the plaintiff to and for the use of the defendant and at his request, to which the defendant has put in two separate and distinct answers—first, that he did not undertake or promise in the manner alleged—secondly, in substance, that the plaintiff had on behalf of the defendant contracted and agreed to purchase from one Hitchcock certain Spanish Bonds; that Hitchcock was not at the time of the contract possessed of the bonds so agreed to be sold by him; that the defendant did not authorise the plaintiff to complete the contract or to pay Hitchcock the price agreed on; and that the differences were voluntarily paid by the plaintiff to Hitchcock against the defendant's consent. There was a similar plea as to the Portuguese Bonds. In answer to that plea, the plaintiff, after stating that he contracted for and agreed to purchase of and from Hitchcock the foreign securities in the plea

1838.

PAWLE v. GUNN.

mentioned at the express request and by the direction of the defendant, and on his behalf, and that he so purchased the same in his own name, and not in the name of the defendant, proceeds to allege that he was called upon and forced and obliged to and did necessarily pay the differences in question; concluding with a formal traverse that the payment was voluntary and against the consent of the defendant: thus embodying in his traverse the two distinct propositions in the defendant's plea, that the payments were made voluntarily and against the defendant's consent. Upon that traverse, I am of opinion that the defendant was bound to make out that the money paid by the plaintiff in respect of the differences was paid voluntarily and against his, the defendant's, consent. There was no evidence whatever to shew that the payment was against the defendant's consent. On the contrary, there was abundant evidence the other way. The evidence was, that the day before the settling day the defendant sent a message to the plaintiff informing him that he was unable to meet his engagements, and therefore compelled to absent himself; and that, after the commencement of the action, he called upon the plaintiff and professed his readiness to pay the sum claimed, provided the action were not proceeded with. Upon the special pleas, therefore, I am of opinion that the defendant is out of court.

This brings us to the question that arises upon the general issue. I agree, that, to entitle him to maintain an action for money paid to the defendant's use, it is incumbent on the plaintiff to shew either that the money was paid by compulsion of law under a contract entered into for the defendant's benefit, or that it was paid at the express request of the defendant. In order to shew that the payment is made by compulsion of law, the plaintiff must shew that he has at the request and for the benefit of the defendant entered into such a contract as the law will compel him to perform. If we were to take upon ourselves to determine whether or

1838.

PAWLE v. GUNN.

not the contract in this case was a contract of that description, we should be compelled to determine a nice and difficult question that has been ingeniously argued before us, viz. whether or not a contract for the sale of Spanish and Portuguese Bonds is a contract for the sale of "goods, wares, and merchandizes," within the meaning of the 17th section of the statute of frauds, and therefore necessary to be proved by a contract in writing signed by the parties to be charged by such contract or their agents thereunto lawfully authorized. It is, however, not necessary to decide that point upon the present occasion. Upon the evidence I am of opinion that a request on the part of the defendant is necessarily to be inferred. I believe no case can be found, and certainly none has been brought to our notice, where an agent, who has entered into a contract on behalf of his principal, and upon that contract become personally liable to pay, and been allowed to pay money on account of his principal, has been held incapable of maintaining an action against him as for money paid to his use, or liable to be turned round because he possibly might have had a defence against the claim made upon him. Suppose a party were to write to one requesting him to lay out a sum of money in charity, could it for a moment be contended that that could not be recovered back as money paid at the defendant's request? This is put but as an example: it is, however, not an inapt illustration of the principle I am endeavouring to lay down. Upon the whole, I think, that, though there was no express request on the part of the defendant, it may fairly be inferred from the evidence in the cause that the money in question was paid by the plaintiff to the defendant's use and at his request; and therefore there is no ground for disturbing the verdict.

. . . . . .

PARK, J.—The frame of the pleadings in this case renders it unnecessary for us to consider the question raised as

1838.

PAWLE v. GUNN.

to the statute of frauds. It seems to me that the true way of considering this case, is, to suppose that it comes before us upon non assumpsit only. Viewing it in that light, I am of opinion that there was sufficient evidence given at the trial to warrant the jury in coming to the conclusion that the money was paid by the plaintiff at the implied request of the defendant. The plaintiff was employed by the defendant to negotiate for him what are called time bargains in certain foreign stocks. In the course of that employment the payments in question were necessarily made. The defendant, being unable to meet the engagements which the plaintiff had thus entered into on his behalf, absconded; but afterwards acknowledged his liability, and promised to pay the amount claimed if the plaintiff would withdraw the action. I think these facts afford ample ground for inferring that the payments made were made at the defendant's request.

BOSANQUET, J., not having heard the earlier part of the argument, merely expressed his concurrence in the principle laid down by the Lord Chief Justice.

Issue on third plea not made out.

COLTMAN, J.—I am also of opinion that this case may be decided without reference to the nice and intricate question that has been argued before us; for, upon the issue joined on the third plea, the defendant was bound to make out affirmatively that the money was paid voluntarily and against his consent: and upon that the evidence wholly failed. With respect to the other point, I see no reason to doubt that the action for money paid is under the circumstances maintainable. This decision will not, as has been suggested, at all militate against the case of *Spencer* v. *Parry*. Where one man pays a debt which another is legally responsible for, the law will infer that such payment was made at the request of the latter, provided the payment was made under compulsion of law.

1838.

PAWER v. GUNN.

All that the court of King's Bench there held, was, that the mere relation of landlord and tenant did not raise an inference that the payment was made at the defendant's request. But it has never been supposed that an action for money paid will not lie where a request may be inferred from the circumstances and from the conduct of the parties. Until his authority was countermanded, the broker was bound to carry into effect the contract. The fact of the retainer here, and the subsequent communication of the defendant clearly warranted the conclusion to which the jury came.

Rule discharged.

Wednesday, May 9th.

Upon a motion for a review of taxation, the party, though successful, is not in general entitled to the costs of the rule.

Where a defendant's costs had been taxed upon the higher scale, in an action in which the sum sought to be recovered was less than 20*l.*, the Master's attention not having been called to the fact—The Court refused to order the taxation to be reviewed.

PARSONS *v.* PITCHER.

THIS was an action brought to recover a sum of 16*l.* In the last term, the court made absolute a rule obtained on the part of the defendant for a review of the taxation, on the ground that the Master had improperly allowed to the plaintiff, instead of to the defendant, costs for proceedings subsequent to the date of a tender of a sum of 11*l.* 8*s.*, which the plaintiff at first refused, but afterwards accepted in satisfaction of his demand (*d*). On the second taxation, the Master allowed the defendant the costs of that rule, though nothing was said about costs at the time: and the costs were taxed upon the higher scale.

Wilde, Serjeant, upon these grounds, obtained a rule for a review of such second taxation.

W. H. Watson now shewed cause.—The costs in question were costs in the cause, being costs of a motion tending towards the final determination of the cause: and in that

(*d*) See 5 Scott, 791. 4 New Cases, 306. 6 Dowl. 432.

case it is neither necessary nor usual to ask for costs (*e*). In motions under the 48 Geo. 3, c. 46, s. 3, or under courts of conscience acts, costs of the rule are never asked for, but the party invariably has them. Here, the costs incurred subsequently to the tender, were costs as to which the Master had no discretion: this therefore was not the simple case of a review of taxation.

The fact of the debt for which the action was brought being below 20*l*., does not appear to have been made known to the Master, and therefore there is no pretence for reviewing the taxation upon that ground. Besides, upon reference to the scale, it will be found to apply only to plaintiffs' costs, and not to those of defendants. [*Bosanquet*, J.—I have made inquiry, and I find the taxing officers have in their discretion applied the scale to the costs of both plaintiffs and defendants.] The letter of the directions clearly excludes the Master's discretion—"In all actions of assumpsit, debt, or covenant, where the sum recovered, or paid into court and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l*. (without costs), *the plaintiff's* costs shall be taxed according to the reduced scale hereunto annexed"—2 Dowl. 485.

The directions to taxing officers, of Hilary Term, 4 Will. 4, apply as well to defendants' costs as to plaintiffs'.

Wilde, Serjeant, in support of his rule.—It is a well established and an universal rule, that, where a party applies *against* a jurisdiction, he gets no costs, though his application is successful (*f*); but that the party who supports the jurisdiction does get costs if he succeeds, under certain circumstances. For a familiar illustration of this

(*e*) It frequently happens that costs of a rule are *asked for* at the time the rule is disposed of, by the party *of right entitled to costs*; and thus a discussion upon the merits is provoked, which sometimes ends in his being *deprived of them*.

(*f*) See Ward v. Bell, 2 Dowl. 76, where the court of Exchequer made absolute without costs a rule for reviewing the taxation, the mistake being with the Master.

1838.

PARSONS v. PITCHER.

rule, the practice on motions for new trials may be referred to.

The directions to the taxing officers, of Hilary Term, 4 Will. 4, clearly were intended to apply to proceedings that are common to both plaintiffs and defendants. Such has been the understanding of the Masters; and there can be no reason why it should not be so. The party who presents his bill for taxation is required to state upon the face of it whether the demand is above or below 20*l.*

TINDAL, C. J.—The general rule, as I understand it, is, that costs are not allowed upon a rule for a review of a taxation: where the motion is founded upon any general principle, the party cannot have costs; but, where it is founded upon the particular facts of the case, he may have costs, but not unless he asks for them at the time. I think this rule must be made absolute to review the taxation as far as regards the costs of the former rule; but not as to the other ground, it not appearing that the Master's attention was not called to the fact of the demand being under 20*l.*

The rest of the court concurring—

Rule absolute accordingly.

Wednesday, May 9th.

POENSGEN and Others *v.* CHANTER and GRAY.

To induce the court to permit a plaintiff who has incorrectly joined in the action one who was no party to the contract, to discontinue without paying costs, it must be clearly shewn that he was induced by the defendant's conduct to believe that the contract was entered into with the two, and that the mistake did not arise from his own negligence.

WILDE, Serjeant, on a former day in this term, obtained a rule calling upon the defendants to shew cause

1838.

POENSGEN v. CHANTER.

why the action should not be discontinued as against the defendant Gray, *without costs*. The affidavit upon which the motion was founded, stated, that the action was brought to recover a sum of 950*l.* which had been paid by the plaintiffs on an agreement entered into by them with John Chanter under the name, style, and firm of "John Chanter & Co.," and signed by him, "John Chanter, for self & Co.;" that the deponent (plaintiff's attorney) had been informed that Gray was a partner with Chanter, and had a printed report or testimonial in which it was stated that the invention to which the contract related had been patented by John Chanter and John Gray (which printed report had been left with the deponent by Chanter himself); and that it was not until after the issuing of the capias, and the same had been lodged with the sheriff, that he learned that Gray was not a party to the contract.

Sanders shewed cause.—He submitted that there was no foundation for the application in its presents form; there not appearing to have been anything in the conduct of the defendant Chanter calculated to deceive or mislead the plaintiffs as to who were the parties with whom they contracted; and that the circumstance of Chanter having been held to bail was of itself sufficient to disentitle the plaintiffs to any favour at the hands of the court.

Wilde, Serjeant, in support of the rule.—The contract was entered into by Chanter in the name of Chanter & Co., and under circumstances, as appears by the affidavit, calculated to induce the plaintiffs to suppose that Gray was one of the parties they contracted with. If the court are satisfied of this, they may in their discretion do that which the rule prays.

TINDAL, C. J.—The plaintiff has a right to discontinue; but at the peril of costs, which the court are in their discretion impowered by the 8 Eliz. c. 2, to award to the

1838.

POSNSGEN v. CHANTER.

defendant. A plaintiff is never allowed to discontinue without paying costs, unless it be made clearly to appear that the step is rendered necessary by the misconduct of the defendant. The question therefore in the present case is, whether we can see clearly that the suing out the writ against the two defendants, Chanter and Gray, was the result of some act or representation of the defendant Chanter. Had it appeared that any application had been made to Chanter for the name of his partner, and that he had induced the plaintiffs to conclude that Gray was the party, there would have been good ground for the application. But all that appears, is, that a prospectus was left with the plaintiffs by Chanter, in which the names of Chanter and Gray appeared as the patentees, and that the contract that was afterwards entered into between the parties, was signed "J. Chanter & Co." I cannot say that this was such a misleading of the plaintiffs as to entitle them to discontinue without payment of costs.

PARK, J.—The plaintiffs should have possessed themselves of better information before they ventured to swear that Chanter and Gray were indebted to them. It does not appear to me that they were misled by Chanter. They have been too hasty, in proceeding on a mere surmise. It is by no means an unusual thing, though it certainly is not a practice to be commended, for traders to add "& Co." to their names, without any foundation.

BOSANQUET, J.—I am unable to see with sufficient certainty that the plaintiffs were misled by any culpable conduct on the part of the defendant Chanter. It appears that the paper left by him with the plaintiffs contained the names of two firms: they ought to have known who they were contracting with: that very circumstance was enough to provoke inquiry.

COLTMAN, J., concurred.

Rule absolute, on payment of costs.

1836.

Thursday, May 10th.

DOE *d.* JAMES KNOTT *v.* LAWTON and Others.

THIS was an action of ejectment brought by the lessor of the plaintiff to recover possession of an undivided moiety of certain premises in the occupation of the defendants. After issue joined, the following case was, by consent of the parties, submitted for the opinion of the court:—

"James Knott, of Lees, in the parish of Under Lyne, in the county of Lancaster, by his last will and testament, signed with his hand, attested and subscribed in his presence by three credible witnesses, and bearing date the 2nd February, 1824, after directing payment of his debts and funeral and testamentary expenses, and giving a legacy of 1*l.* to his eldest son, John, whom he appointed his executor, made a devise in the following words:—'I give and bequeath to my sons James and Joshua my *estate* that I now occupy, together with the factory and all the edifices and appurtenances thereon, except the house I now occupy, and five yards for a passage, being together eighteen yards in front, and about twenty yards back, with the cottages thereon, occupied by Daniel Clegg and Mr. Cleverty, and all other conveniences thereon, which I give to my daughters Martha and Alice jointly, share and share alike.'

"The testator then devised to his daughter Martha a smithy, and to his daughter Alice a plot of land and building thereon occupied by certain persons named; and, after charging the 'estate heretofore given to my sons,' with certain payments particularly specified, in a subsequent part of the will he bequeathed to Joshua 'that *estate* or tenement lying and being at Hartshead, occupied by R. F., which I hold under lease from the

The words "my estate," in a devise, are sufficient to pass a fee, unless accompanied by words of restraint.

The testator, possessed of the fee, after directing payment of his debts and funeral and testamentary expenses, and giving a legacy of 1*l.* to his eldest son, John, whom he appointed his executor, made a devise in the following words:—"I give and bequeath to my sons James and Joshua my *estate* that I now occupy, together with the factory and all the edifices and appurtenances thereon, except the house I now occupy, with the cottages occupied by C. and D., which I give to my daughters Martha and Alice jointly, share and share alike." He then devised to his daughter Martha a smithy, and to Alice a plot of land and building thereon occupied by certain persons named; and, after charging the "*estate* heretofore given to my sons" with certain payments particularly specified, in a subsequent part of the will he bequeathed to Joshua "that *estate* or tenement lying and being at H., occupied by R. F., which I hold under lease from the Earl of Stamford, *during the term of my lease*:"—Held, that, under the first devise, James and Joshua took a fee in all except the house and cottages; and that the daughters took a fee in those.

1838.

DOE d. KNOTT v. LAWTON.

Earl of Stamford and Warrington, during the term of my lease.'

"The said James Knott was at the time of making his will seised in fee-simple of all the premises described in the first of the above devises, and died seised thereof in September, 1826, without having revoked or altered his said will, leaving his said son John his heir-at-law, and his said sons James and Joshua, him surviving.

"The daughters Martha and Alice both survived the testator. Martha is still living: but Alice died in August, 1836, leaving her husband, James Mellor, and one son born of the marriage, her surviving.

"John Knott, the testator's eldest son and heir-at-law, died in the life-time of Alice, intestate as to his real estate, and without leaving lawful issue: and thereupon James Knott, the lessor of the plaintiff, being the testator's second son, became and was the heir-at-law as well of the testator James Knott as of the said John Knott.

"The defendants were the tenants in possession of the premises which were so devised as above mentioned by the testator to his 'daughters Martha and Alice jointly, share and share alike:' and the defendants, disclaiming the title of the lessor of the plaintiff, claimed to hold the said premises adversely to the lessor of the plaintiff, and as tenants thereof to the said James Mellor and the said Martha, or one of them.

"The lessor of the plaintiff contended, that, under the above devise, the daughters of the testator, Alice and Martha, took as tenants in common (*g*) only estates for life in the devised premises; and that, upon the death of Alice, the lessor of the plaintiff, as heir-at-law as aforesaid, became and was entitled to the undivided moiety of the said premises; or that the lessor of the plaintiff was entitled thereto, or to part thereof, as joint devisee in fee

(*g*) The question whether the daughters took as tenants in common or as joint tenants, was not raised on the argument of the case.

1838.

Doe d. Knott v. Lawton.

in remainder with his brother Joshua Knott under the above devise."

The question for the opinion of the court was—"Whether the plaintiff was entitled to recover in this action. If the court should be of that opinion, then the defendants agreed that judgment should be entered against them by confession, for one shilling damages, immediately after the decision of this case, or otherwise, as the court might think fit. And if the court should be of opinion that the plaintiff was not entitled to recover in this action, then the lessor of the plaintiff agreed that a judgment should be entered against the plaintiff of nolle prosequi, immediately after the decision of this case, or otherwise, as the court might think fit."

The case was argued in Hilary Term last, by *Wilde*, Serjeant, for the plaintiff, and *Mellor*, for the defendants.

Wilde, Serjeant, for the plaintiff.—The testator's two daughters, Martha and Alice, took under this devise only estates for life. The word "estate" in a devise is usually understood as descriptive of property and not of interest. Where it is unrestrained by the context it has been held to include both. But, where it is associated with words descriptive of locality, authorities are to be found favouring both constructions. At an early period, the courts required that the word "estate," to carry a fee, should be unaccompanied by words of local description: at a later period, they held, that, notwithstanding such association, the word "estate" would carry a fee, unless its effect were restrained by the other parts of the will: and the modern cases have gone back to the old rule, and hold, that the word "estate" is limited and controlled by the accompaniment of words of local description. The testator here begins by directing payment of his debts and funeral and testamentary expenses out of his "estate" and effects—

1838.

Doe d. Knott v. Lawton.

clearly applying the word there to *property* and not to *interest*. He then proceeds to give to his eldest son, John, a legacy of 1*l*. A manifestation of disposition on the part of the testator to disinherit his heir-at-law has sometimes been relied on as explaining his intention in a devise to the rest of his family. The testator, however, appoints his eldest son his executor, a circumstance very strong to shew that he did not want confidence in him. As well may it be argued that the testator contemplated that the remainder expectant on the estate for life would go to the heir, and therefore gave him nothing, as that he intended to disinherit him: such an intention is not to be presumed. The word "estate" being coupled with "factory" and "edifices," clearly indicates that the testator had not in his contemplation his legal interest, but used the whole as mere words of description. In a subsequent part of the will are separate devises of property to the two daughters wholly unconnected with the prior devise, and wholly unconnected with the property in the testator's own occupation. Then come certain specific legacies, which he directs his executors to pay, and charges upon the "estate heretofore given to my sons." Then follows a bequest to his son Joshua in these words: "That *estate* or tenement lying and being at Hartshead, occupied by R. F., which I hold under lease from the Earl of Stamford and Warrington, *during the term of my lease*." The word "estate" there is distinctly applicable to the body of the property and the locality, and not to the testator's interest. [*Vaughan*, J.—May not the testator have used the same word in different senses in different parts of the will?] The legal presumption is that it is used in the same sense throughout. All arguments, however, arising from the collocation of words in a will must necessarily be extremely unsatisfactory. In *Doe* d. *Child* v. *Roe*, 1 N. R. 345, Sir James Mansfield says: "In almost all the cases where questions of this sort have arisen, it has been next to impossible out of a

1838.

DOE d. KNOTT v. LAWTON.

court of justice to doubt of the testator's intention to give the thing absolutely to the devisee. When a man gives a house, he supposes that he gives it in the same manner as he gives a personal chattel. On the other hand, it may be said, that, as the common sense of mankind proves the intention to give an absolute estate, particular circumstances indicating such intention cannot prove it more strongly than the general devise; and that nothing therefore ought to be relied upon but express words in the will. And this certainly is the safest side; for, it cannot be denied, that, where wills are interpreted on the force of particular circumstances indicating particular intentions, decisions so founded are more likely to lead to litigation than those which are founded upon adherence to the general rule, that, unless there be express words of limitation, or something which renders it necessary to give an estate of inheritance, the heir-at-law shall not be disinherited. Whenever a case is decided on circumstances, others who are to judge afterwards may receive a different impression from the same case; whereas, the adherence to a general rule is more calculated to avoid uncertainty." No words of inheritance are to be found in any part of this will—nothing whereon to rest a presumption that the testator contemplated granting a fee to any one. In *Pettiward* v. *Prescott*, 7 Ves. 541, a devise of "my copyhold estate at Putney, consisting of three tenements, and now under lease," &c., but not specifying for what interest, was held to pass only an estate for life. The Master of the Rolls, Sir W. Grant, there says: "At an early period it was doubted whether the word 'estate' merely was to be applied to the land only, or to the interest in it. It has been long settled that it is of itself sufficient to carry the fee. But, when words of locality, as 'in' or 'at' a particular place are added, the question is whether they do not narrow and restrain the import of that word." And, after observing that the opinions of Lords Talbot, Hardwicke, Mans-

1838.

DOE d. KNOTT v. LAWTON.

fild, and Kenyon, were in accordance, concluded with holding that the word "estate" in the devise before him, imported a mere description of the thing, and not the *interest* of the testator. That case has been supposed to have been over-ruled by *Roe* d. *Child* v. *Wright*, 7 East, 259, and *Randall* v. *Tuchin*, 2 Marsh. 119, 6 Taunt. 410. This is assumed in *Gardner* v. *Harding*, 3 Moore, 565. But it is to be observed that in neither of the two first mentioned cases was *Pettiward* v. *Prescott* cited or alluded to: and in both of them the word "estate" was found in the operative part of the devise. In *Gardner* v. *Harding*, the devise was "to my brother J. G., of &c., my *freehold estate*, consisting of thirty acres of land, more or less, with the dwelling-house, and all erections on the said farm, situated at Sudbury-Harrow, in the county of Middlesex, now in the occupation of my brother J. G. above mentioned;" and the court held that the fee passed. There, the legal interest is described in terms. In *Gall* v. *Esdaile*, 1 M. & Scott, 466, 8 Bing. 323, the testator, after giving some small pecuniary legacies, devised as follows:—"As to the rest of my *estate*, the two houses, one in St. John's Lane, and the other in Togwell Court, I give to my wife for her life, and, after her decease, that in St. John's Lane to my daughter, the other between my two sons, to be equally divided: as to the rest of my *estate*, of what nature soever, one third to my wife, and the rest to be divided equally among the three children." The testator left no real property except the two houses above mentioned. And this court held that the daughter took a fee in the house in St. John's Lane. In the same case, however, the Master of the Rolls (1 Russ. & M. 540) held that she took an estate for life only. In *Doe* d. *Norris* v. *Tucker*, 3 B. & Ad. 473, the testator being seised in fee of the premises after mentioned, devised as follows; "I give and bequeath to my wife *my freehold estate called Pouncetts*, during her natural life. I give to my son Richard, my

heir, after the death of my wife, 10*l.* Item, all *the above bequeathed lands*, goods, and chattels, after the death of my wife, I give and devise to my son Richard, to my son Thomas, to my son Robert, and to every other of my children then being, share and share alike, equally to be parted between them:" and it was held, that, under this devise, the children only took life estates in their respective shares, after the death of the wife. "The term 'estate,'" says Lord Tenterden, "may operate only as a desription of the particular lands, or may mean also the quantity of testator's interest in them. Here it appears to me that the words 'my freehold estate called Pouncetts', are merely descriptive of the lands, and not of the quantum of interest." And the other judges, Littledale, Parke, and Patteson, expressed similar opinions. In *Doe* d. *Sewell* v. *Parratt*, 3 B. & Ad. 469, the testator devised all his real estates in Jamaica, and all the residue of his real estates, to trustees, in fee, for the benefit, ultimately, of his heirs at law: by a codicil he bequeathed to another party 1200*l.* (the amount of a bond debt), and further devised as follows:—"I also bequeath to him my chambers in Albany, for which I paid 600 guineas, with all my furniture, except such articles as I may particularly except from this donation." The testator had bought the fee-simple of these chambers (of which he died seised) for 600 guineas; and he had no other chambers in Albany: and it was held that the devisee under the codicil took only a life estate. Littledale, J., there said: "It is argued, that 'my chambers in Albany, for which I gave 600 guineas,' must mean all that interest for which the testator gave such a sum: but to put such a construction on these words would be introducing a new class of cases. And in *Lushington* v. *Sewell*, 1 Sim. 435, where the same codicil was before the Vice-Chancellor, he considered the devise of the chambers to be for life only. In *Doe* d. *Gwillim* v. *Gwillim*, 5 B. & Ad. 122, 2 N. & M.

1838.

DOE d. KNOTT v. LAWTON.

247, the testator devised as follows:—"As touching my worldly estate, I give, devise, and dispose of the same in the following manner: first, I give to my wife Ann *the whole of my estates*, goods, and chattels, living stock, and debts, during her widowhood, and no longer, but demeatly to go to my dear children *as I have appointed and disposed to them in lots and in money.*" He then, after giving to his eldest son a sum of money, left to his second son a lot of land (therein described), to him and his lawful heirs for ever: and, if no heirs, to his next brother and his lawful heirs for ever. Then followed four other devises in similar terms to four other sons, and then he *gave to his son John a dwelling-house and piece of ground &c., also his goods and living stock.* He then devised to his daughter a house and gardens, and to her son and his lawful heirs for ever. And it was held that John took a life estate only in the house and ground devised to him. These cases shew, that, in modern times, the courts have evinced a disposition to recur to the old rule, and to hold that very slight words of description will control the effect of the word "estate." In *Doe* d. *Ashby* v. *Baines*, 2 C. M. & R. 23, the testator, after giving a pecuniary legacy to his heir-at-law, directed his debts and funeral expenses to be paid and discharged by his executrix hereinafter named. He afterwards gave to his daughter E. S., whom he made, constituted, and ordained his executrix, all and singular his lands, tenements, and messuages, *by her freely to be possessed and enjoyed*: and it was held that a life estate only passed to the executrix under this devise. Lord Abinger there says: "The whole context of a will must be looked to; but in the present case it furnishes nothing to shew that the testator intended to give more than a life estate to his daughter Elizabeth Simpson. There is no clause in the will, and no condition imposed upon her, requiring a larger estate; nor are there any words used which in themselves are capable of carrying a fee. The testator has not

1838.

DOE d. KNOTT v. LAWTON.

devised his 'estate,' and the devise of his *lands* 'freely to be possessed and enjoyed,' is not, it is quite clear, equivalent to a devise of the fee-simple." And Bolland, B., says: "Neither the mode of enjoyment described 'freely to be possessed, and enjoyed,' nor the description of the property itself, 'lands, tenements, and messuages,' is sufficient to pass a fee." The present case is a much stronger one in favour of the construction contended for than any of those above cited. The words with which "estate" is associated in the devise to the sons, clearly shew that it was used with reference to local description only. And, even if they took a fee, the daughters do not. [*Tindal*, C. J.—We must give the word "estate" the same construction in both cases.] In *Goodright* d. *Drewry* v. *Barron*, 11 East, 220, after introductory words, "as touching" the testator's "worldly *estate*" &c., he devised a cottage, house, &c., to A. and his heirs, and also gave to B., whom he made his executrix, "all and singular his lands, messuages, and tenements, *by her freely to be possessed and enjoyed*:" and it was held that these latter words, being ambiguous, did not pass a fee against the heir; but might mean free of incumbrances, or dispunishable of waste; and that the word *estate* in the introductory clause could not be brought down into the latter distinct clause (*h*).

(*h*) See Roe d. Kirby v. Holmes, 2 Wils. 80. There, the testator, being seised in fee of copyhold lands, devised as follows:—"Whereas I have surrendered, or intend to surrender, all my copyhold lands and tenements to the use of my last will, I do hereby give and devise the same to my daughter Jane, her heirs and assigns for ever; but, in case my said daughter dies before she attain the age of twenty-one years, and have no issue, then my will is that my nephew J. H. *shall have my said copyhold lands and tenements.*" And "the whole court were clear of opinion that the nephew only took an estate for life; that the testator, by his devise to Jane, plainly understood the force of words of limitation, and, if he had intended to give his nephew more than an estate for life, he knew how to have done it; that there were no express words in the will that gave the nephew a fee, nor any manifest intention to

1838.

DOE d. KNOTT v. LAWTON.

Mellor, for the defendants.—Under this will both sons and daughters took estates in fee in the property devised to them respectively. That the word "estate," unless restrained by words shewing unequivocally a contrary intention, suffices to pass a fee, is too clear to be now disputed; and the mere addition of words of local description will not cut it down to a life estate. In *Tuffnell* v. *Page*, 2 Atk. 37, the devise was of "my *estate* in Kirby Hall, near Henningham Castle, by Henningham town, which is 135*l.* per annum:" and Lord Hardwicke said: "The word *estate* is sufficient to pass, not only the land, but all the interest the testator had in it besides; for, though here is a locality, Kirby Hall, yet the testator meant his interest in it too: for, suppose, and I believe it has happened, a man should give all his real estate in England, here is a locality, and yet none will say that the interest does not pass as well as the estate." In *Ibbetson* v. *Beckwith*, Cas. temp. Talbot, 157, it was held that a testator setting out in his will to give and dispose of his "worldly estate," is a strong proof that he intended to dispose of the inheritance of his lands, when there are sufficient words in the following parts of the will for that purpose; and that the words "estate *at such a place*," or *in* such a place, may carry a fee. In *Roe* d. *Child* v. *Wright*, 7 East, 259, it was held that the capability of

do so, or to disinherit the heir at law."

And see Doe d. Viner v. Eve, 5 Ad. & E. 317. There, the testator by his will directed that his debts &c. should be paid out of the rents and profits arising from his estate; after which he gave and bequeathed to C. V. the rents and profits of his estate, subject to C. V. keeping the whole of the premises in repair during his life: "only after his death I give and bequeath unto my three nieces (describing them) all that freehold or leasehold premises now rented, &c., situated, &c., to and for their own use and purposes, equal share and share alike." He then gave and bequeathed some other freehold or leasehold premises, and some plate &c.: and he left the rest and remainder of his property, be it what it might, to C. V.: and it was held that a niece took only a life estate under the will.

1838.

DOE d. KNOTT v. LAWTON.

the word "estate" to carry a fee was not restrained in a devise of "all my *estate*, lands, &c., known and called by the name of the Coal Yard, in the parish of St. Giles, London." Lord Ellenborough there says: "It is admitted by the counsel for the lessors of the plaintiff, that the words *all my estate*, in a will, in general comprehend not only the *thing*, or subject-matter of the devise, but the *interest* in it, and give a fee to the devisee, unless the effect of these words be restrained or qualified by the context. But he contends that the effect of them is so restrained and qualified in the present instance; and that the words '*lands &c. known and called by the name of the Coal Yard, in the parish of St. Giles, London*,' which immediately follow the word *estate*, are to be understood as merely descriptive of the name and local situation of the thing or subject of the devise, and not of the devisor's *interest* therein; and that the word *estate*, thus accompanied, has no other effect than the words 'lands freehold and copyhold,' in an antecedent part of this same will have already, by a decision of this court, and also since of the court of Common Pleas, been allowed to have, in the case of *Doe* d. *Child* v. *Wright*, 8 T. R. 64, and in that of *Doe* d. *Wright* v. *Child*, 1 N. R. 335, where they were holden to carry a life estate only. The general effect of the words '*all my estate*,' in a will, or even where those words are coupled with others limiting them in point of place; as, all my estate *in* or *at* a certain specified place, has been so fully settled by most of the various cases cited for the defendant, as carrying a fee—viz. by *Wilson* v. *Robinson*, before Lord Hale, in 2 Lev. 91 and 1 Mod. 100, *Countess of Bridgewater* v. *The Duke of Bolton*, 6 Mod. 106 and 1 Salk. 236, before Lord Holt, by *Barry* v. *Edgworth*, 2 P. Wms. 524, *Ibbetson* v. *Beckwith*, Talbot, 157, *Tuffnell* v. *Page*, 2 Atk. 37, *Goodwyn* v. *Goodwyn*, 1 Ves. 228, and lastly, in the case of *Holdfast* v. *Marten*, 1 T. R. 411 (which last case, with the exception of the residuary

1838.

DOE d. KNOTT v. LAWTON.

clause in that case, is nearly in terms with the present), that it is unnecessary to add any observations upon them to those which have been made at the bar. Considering, therefore, the words 'all my estate,' in the language of Mr. Justice Buller in *Holdfast* v. *Marten*, as the most general and effectual words that can be used to pass a fee; 'and that, so far from its being necessary to add words of inheritance, in order to make it pass a fee, words of restraint must be added in order to carry a less estate;' this question will then turn solely upon the supposed words of restraint in the present instance. And I cannot but consider the words '*lands*,' &c., which follow the word estate, as descriptive only of the subject-matter in which the general interest predicated before by the word *estate* consisted; and as tantamount to 'all my estate in *lands*,' &c., or to 'all my estate *in lands, houses, or whatever else it may be:*' and, between the words 'all my *estate, lands*,' &c. in this case, and 'all my *land* and *estate*,' in the case of *Barry* v. *Edgworth*, there seems to be no material difference in point of reason and effect, so as to require a distinct construction. The vice of the plaintiff's construction is, that *estate* and *lands* &c., must be made to mean the same thing as *lands* only, in order to defeat the effect of the word *estate:* whereas, according to the defendant's construction, each word will have its proper signification, namely, the word *estate* as expressive of the entire interest; *lands* as expressive of the particular subject-matter or particular kind and quality of the thing in which such entire interest subsists." In *Chichester* v. *Oxendon*, 4 Taunt. 176, a devise of "all my estate of Ashton," and in *Uthwatt* v. *Bryant*, 6 Taunt. 317, of "my freehold estate in the parish of Buckingham," were respectively held to pass the fee. So, in *Roe* d. *Allport* v. *Bacon*, 4 M. & S. 366, where the testator devised to his wife "all and singular his freehold lands, messuages, and tenements, at &c. or elsewhere, together with all his

1838.

DOE d. KNOTT v. LAWTON.

household goods &c., for life, and after her decease then all *the said estates*, goods, &c., to be divided among my sons (naming them) share and share alike," it was held that the sons took a fee in the lands after the death of the wife. And in *Randall* v. *Tuchin*, 6 Taunt. 410, it was held that the word "estate" used in the operative clause of a will, *although referring to locality*, conveys a fee-simple, unless there is in the will other matter to control that signification. Gibbs, C. J., there said: "It is admitted by the counsel for the plaintiff that the word *estate* carries a fee, unless other parts of the will control its effect. Formerly, a narrower construction prevailed, and it was held, that, if the former words described locality, the word estate was not descriptive of the quantity of interest, but designated local position: but it is now held, that, though the word estate points at a certain house or parish where the estate is situate, yet it shall carry a fee, unless restrained by other parts of the will. It may be that the signification of the word estate may be restrained, but it lies on the party who seeks to narrow its construction, to shew by what expressions in the will it is restrained." In *Edwards* v. *Barnes*, 2 New Cases, 252, 2 Scott, 411, and in *Wilce*, dem., *Wilce*, ten., 5 M. & P. 682, 7 Bing. 671, the word "property" was held sufficient to pass a fee. In *Jackson* v. *Hegan*, 3 Bro. P. C. 389, Cowp. 299, the testator gave and bequeathed to his mother all the remainder and residue of all the *effects*, both real and personal, which he should die possessed of; and it was held that these words were sufficient to carry the inheritance of the testator's real estate (*i*). The case of *Gall* v. *Esdaile*, 1 M. & Scott, 466, 8 Bing. 323, is precisely in point, and has never been questioned. In *Grayson* v. *Atkinson*, 1 Wils. 333, a testator, seised in fee, commenced his will as follows: "As to

(*i*) See Doe d. Tofield v. Tofield, 11 East, 246, where it was held that a fee passed under the words "all my personal estates."

1838.

DOE d. KNOTT v. LAWTON.

my temporal estate, I dispose thereof as follows," &c., and, after giving various legacies, he proceeded—"As to all the rest of my goods and chattels, real and personal, moveable and immoveable, as, houses, gardens, tenements, my share in the copperas works, &c., I give to A.," without words of limitation; and it was held that A. took a fee. *Goff* v. *Hayward*, Roll. Rep. 368, is to the same effect. Much depends upon the collocation of the words; and still more upon the intention of the testator, which the court will always endeavour most anxiously to carry into effect. Abbott, C. J., in *Doe* d. *Wickham* v. *Turner*, 2 D. & R. 398, says: "There is a third rule of law bearing upon this subject, which has not been attended to on the present occasion, viz. that, in deciding questions of this kind, a will is to be taken altogether, or, as Lord Kenyon emphatically expresses it, 'you are to look into all the four corners of the will;' and the sense in which particular words *are intended to be used* in one part may be discovered by seeing in what sense those words *actually are used* in other parts" (*k*). Here, the devise to the sons was clearly sufficient to carry a fee; and the effect of the exception is, to give to the daughters, in the part so excepted, the same estate as that out of which the exception is made.

Pettiward v. *Prescott*, the case mainly relied on for the plaintiff, has always been understood to have been overruled by *Roe* d. *Child* v. *Wright*, *Randall* v. *Tuchin*, and *Gardner* v. *Harding*: it is so treated in all the text-books (*l*).

(*k*) See Strong v. Teatt, 2 Burr. 910, Doe d. Long v. Laming, 2 Burr. 1100. In the latter case, Lord Mansfield says: "If the *intention* of the testator be contrary to the rules of law, it can no more take place in a court of equity than in a court of law. On the ther hand, if the intention be not contrary to law, a court of common law is as much bound to construe and effectuate the will *according to that intention* of the testator as a court of equity can be."

(*l*) See Jarman on the construction of devises—2 Pow. Dev.—414, &c.

And see the cases collected in Cruise's Digest, 4th edit., by White, pp. 215, n., 271, n.

In *Doe* d. *Norris* v. *Tucker*, the interposition of the pecuniary bequest to the heir between the two clauses relating to the real estate, destroyed the connection between them, and prevented the latter from operating as a devise of the fee. *Gardner* v. *Harding* and *Grayson* v. *Atkinson* were not cited there. In *Doe* d. *Ashby* v. *Baines*, the word estate was not found in the will, nor was there any thing to shew that the testator intended to give more than a life-estate (*m*).

Wilde, Serjeant, in reply.—It may be conceded that it is now too late to deny that the word "estate," in a will, carries the fee: but, to have that effect, it must be unrestrained and uncontrolled by any words of local description. Here, it is restrained and controlled by the reference to the "factory, edifices, and appurtenances thereon." In *Grayson* v. *Atkinson*, the words of the will, taken together, were such that the testator's intention to give a fee to A. could not be doubted. That the whole of the will may be looked at for the purpose of ascertaining the intention of the devisor, is not disputed. The heir at law is not to be disinherited by conjecture or surmise, or in the absence of express words or necessary intendment.

Cur. adv. vult.

(*m*) In Doe d. Hickman v. Haslewood, 6 Ad. & E. 167, 1 N. & P. 352, by a will apparently drawn by an illiterate person, the testator bequeathed to his wife, her heirs and assigns for ever, all the residue of his goods, chattels, and personal estate; and likewise made her full and sole executrix of the freehold house, situate in &c. No other person or property was specified in the will, nor any executor appointed, except as above: and it was held that the wife took a fee in the house. And in Doe d. Pratt v. Pratt, 6 Ad. & E. 180, 1 N. & P. 366, where P. by his will directed that his debts and funeral expenses should be paid by his executor thereinafter named, and, after giving two life annuities of 2*l.* 10*s.* each, and a bequest of 5*s.* to J. P., his heir at law, he appointed W. P. his sole executor of his houses and land situate at F.—it was held that the houses and land at F. passed to W. P. and that he took an estate in fee.

1838.

DOE d. KNOTT v. LAWTON.

TINDAL, C. J., now delivered the opinion of the court:—In the course of the argument in this case, the only question that has been made has been, whether, upon the proper construction of the will of James Knott, his daughters Martha and Alice took in fee or for life only.

The word "estate" in a will has been held, in a series of cases at once so numerous and so uniform, to extend to the quantity of interest which the testator has in the land devised, that the general rule is laid down, that it shall carry a fee where the testator has a fee, unless the intention is broken in upon by other expressions in the will, clearly shewing that it is intended to have a more limited construction. And the cases shew, that, in order to give it a restricted sense, it is not enough that it is accompanied by words which shew it to point also to local situation, or to make it referable to the corpus of the land devised. This appears from the instance so frequently referred to, of the devise of "my estate of Ashton," or, as it was stated by the court to be the same in legal construction, of "my Ashton estate"—*Chichester* v. *Oxendon*, 4 Taunt. 176, 4 Dow. 92: and, again, the devise of "all my *estate*, lands, &c., called or known by the name of the Coal Yard, in the parish of St. Giles, London"—*Roe* d. *Child* v. *Wright*, 7 East, 259: in both which cases the word "estates" was held to carry a fee. And, looking to the words of the will now before us, we think the devise to the testator's two sons, James and Joshua, of "my estate that I now occupy, together with the factory and all the edifices and appurtenances thereon," clearly falls within the general rule, and, if there had followed no exception, would have carried a fee in the whole estate, with every building upon it, to his two sons. And we think the exception out of the devise, under which the daughters claim, does by necessary intendment carry the same quantity of estate as that from which it is excepted. Out of the devise to his two sons of the estate he occupies,

1838.

DOE d. KNOTT v. LAWTON.

the testator excepts "the house I now occupy, with the cottages *thereon* occupied by Daniel Clegg and Mr. Cleverty, and all other conveniences *thereon*." And if a contrary construction should be adopted, and it should be held, that, because the testator has used in the exception the words "house and cottages thereon," he only intended an estate for life to the daughters, a similar construction ought to be put on the words of the devise to the sons, "with the factory and all the edifices and appurtenances *thereon;*" but this would lead to a consequence which seems contrary to the intention of the testator, namely, that the sons James and Joshua should take the fee in the estate he occupied, but only take an estate for life "in the factory and all the edifices and appurtenances thereon,'" which upon their death should go over to the eldest son and heir-at-law; whilst, under the same construction, the two devisees, James and Joshua, upon the death of their sisters, would take the house and cottages on the estate occupied by the testator, in fee—a construction which appears to us to be unreasonable. But, looking at the devise generally, we think it amounts in effect to this—that the testator gives to his two sons so much of the estate he occupied as he describes, and the remainder of the estate to his two daughters.

Some reliance was placed in argument upon the circumstance, that, in a subsequent part of the will, the testator has devised to one of his sons by the same word "estate," certain premises in which he states in his will that he had a leasehold interest only. The terms of that devise are—"that estate or tenement lying and being at Hartshead, occupied by R. F., which I hold under lease from the Earl of Stamford and Warrington, during the term of my lease." But, as it appears manifest, that, in this particular devise, the testator intended the word "estate" to carry the whole of the interest he had, we cannot draw the inference from it, that, in the case where he uses that

1838.

DOE d. KNOTT v. LAWTON.

term in respect of lands which he holds in fee, the general meaning of the term is to be restricted to less than the fee.

We therefore think, that, under this devise, the two daughters took an estate in fee, and consequently that a nolle prosequi must be entered.

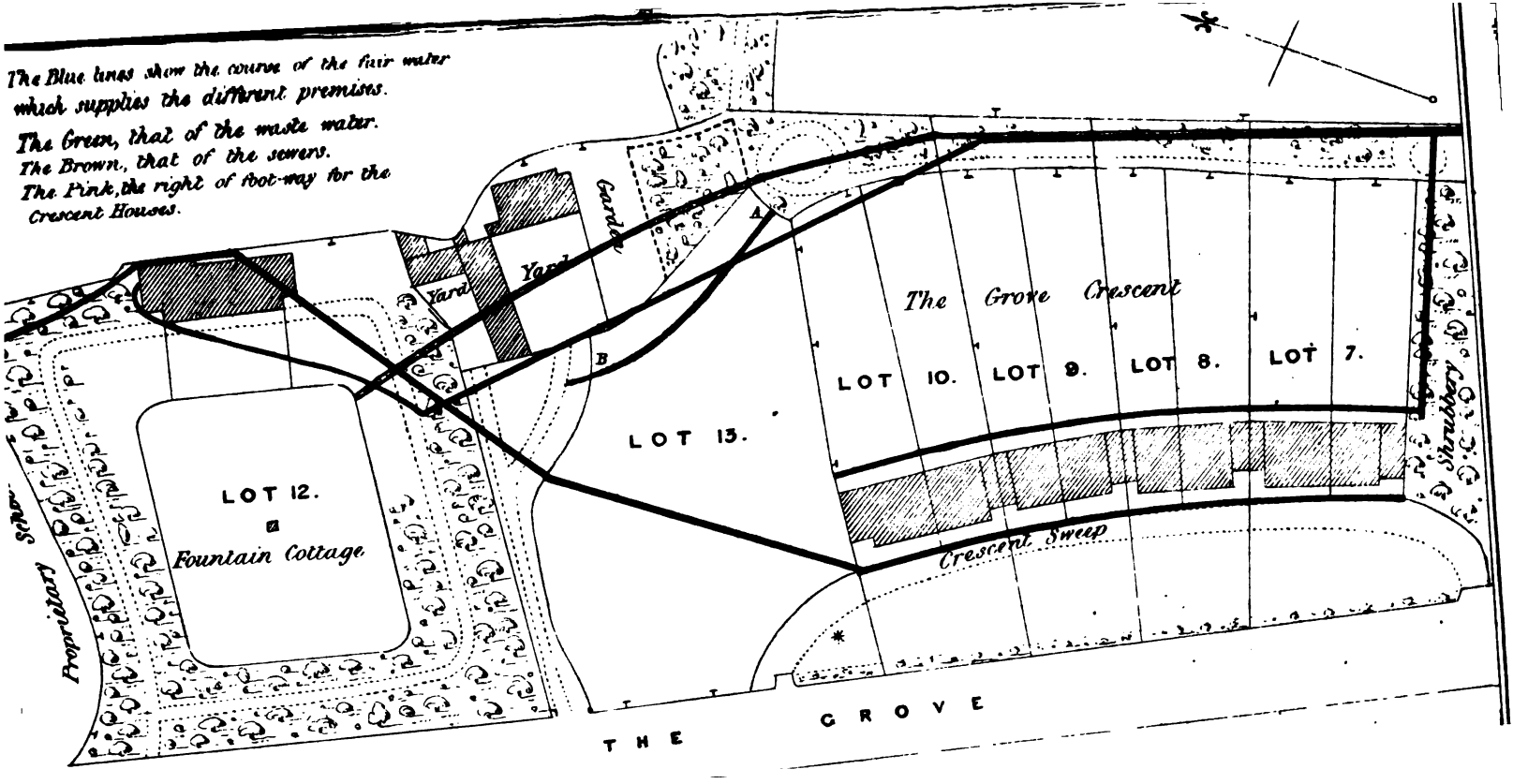
Judgment for the defendants.

Thursday, May 10th.

DYKES *v.* BLAKE.

Certain property was offered for sale by public auction, in lots. The particulars, in describing lot 12, stated that the purchaser of that lot would be entitled to a right of carriage and foot way thirteen feet wide over lot 13, as shewn upon a plan annexed to the particulars, bearing and paying one moiety of the expense of keeping the road in repair. Lot 13 was described as "a first-rate building plot," with a frontage to a place called the Crescent sweep; and it was stated that that lot would include the ground forming part of the Crescent sweep comprised within the boundary of lot 13 by a line marked upon the plan, "subject for ever hereafter to the same rights of way and passage, and other rights and easements over the same, as are now enjoyed under the existing leases of the Crescent houses." The particulars of lot 7 described the two Crescent houses comprised in that lot as let on lease for a certain term, and stated that the lease might be seen at the office of the vendor's attorney, and would be produced at the sale. The plaintiff attended and bid at the sale; lots 12 and 13 were severally knocked down to him; and he signed a single contract of purchase for the two at the foot of one of the printed particulars, and paid a deposit. The plaintiff afterwards discovered, that, in the leases of the Crescent houses, there was reserved to the occupiers a right of way over lot 13, on foot and for the conveyance of gravel, manure, &c., from their gardens to the road. This right of way did not appear upon the plan:—Held, that, inasmuch as there was no sufficient disclosure of this right of way to enable a bidder by the exercise of ordinary vigilance to discover that such right existed, but, on the contrary, the plan being calculated to mislead, the misdescription, however unintentional, was such as to justify the plaintiff in refusing to accept either lot (the two being comprised in one contract, and the purchase of the one appearing to have induced the purchase of the other), but was entitled to recover back with interest the deposit paid to the auctioneer; and this notwithstanding a condition annexed to the particulars of sale—that, if any mistake were made in the description of the premises, or any other error should appear in the particulars, such mistake or error should not annul the sale, but a compensation or equivalent should be given or taken, as the case might require.

THIS was an action of assumpsit for money had and received, brought to recover the sum of 633*l.* 0*s.* 5*d.*, and interest, being the amount of deposit and auction duty paid by the plaintiff to the defendant, who was an auctioneer, on the purchase of two lots, Nos. 12 and 13, forming part of several lots of property at Camberwell put up for sale at Garraway's Coffee-House, in London, on the 20th May, 1836, and described in the particulars of sale as delineated on the following plan:—


The Blue lines shew the course of the fair water which supplies the different premises.
The Green, that of the waste water.
The Brown, that of the sewers.
The Pink, the right of foot-way for the Crescent Houses.
Garden
Yard
Yard
A
B
The Grove Crescent
LOT 10.
LOT 9.
LOT 8.
LOT 7.
LOT 13.
LOT 12.
Fountain Cottage
Crescent Sweep
Proprietary
Shrubbery
THE GROVE

1838.

DYKES v. BLAKE.

At the trial before Tindal, C. J., at the sittings in London after Hilary Term, 1837, a verdict was found for the plaintiff, subject to the opinion of this court, who were to draw such inferences from the facts stated in the following case as a jury might have done, and to state for what sum the verdict should be entered.

Previously to the time of the sale, printed particulars with conditions of sale had been issued to the public. The particulars thus issued contained the following description of the said lots 12 and 13:—

Description of lot 12.

"Lot 12. The celebrated Fountain Cottage [describing it], let to J. M. Gerothwohl, Esq., upon an agreement for a lease for nine years from Midsummer, 1833. The covenants in the agreement will be read at the time of sale. The purchaser of this lot will be entitled to a right of carriage and foot-way thirteen feet in width over lot 13, on the Northern boundary thereof, as shewn upon the plan; bearing and paying one moiety of the expense of keeping the road in repair. This lot is supplied with water from lot 1, without any rent or payment for the same; and the purchaser will be entitled to have water supplied as heretofore from lot 1, until Midsummer, 1842, but not afterwards; and the lot is sold subject to liberty for the purchaser of lot 1 to come upon the premises at all reasonable times to repair the main laid from the reservoir in lot 1 and the drain and sewer in the same premises, in like manner as reserved in lot 7."

Description of lot 13.

"Lot 13. A first-rate building plot of freehold ground, land-tax redeemed, called the Crescent Field, lying between lots 10 and 12, inclosed from the Grove by an ornamental iron fence, to which it has a frontage of eighty-six feet, besides another frontage of about ninety feet to the Crescent Sweep, as shewn upon the plan. Unquestionably as fine a situation for building as any in Camberwell; together with the stable-yard and planted ground in the rear, including two small tenements [describing them]. The

1838.

DYKES v. BLAKE.

entire site of this lot comprehends about one acre, be the same more or less. This lot will include the ground forming part of the Crescent Sweep marked with an asterisk upon the plan, subject for ever hereafter to the same rights of way and passage and other rights and easements over the same as are now enjoyed under the existing leases of the Crescent-houses, and subject to a similar reservation for the purchaser of lot 1 in respect of the main from the reservoir, and the drain and sewer, as is made out of lot 12."

Reservation in the description of lot 7.

The reservation in the description of lot 7, referred to in the foregoing description of lot 12, was in the following words:—"This lot is to be supplied with water as specified in the description of lot 1, and will include that portion of the ground next the Grove, which lies in front of this lot, as shewn on the plan by the line drawn from East to West; and also that portion of the planted ground on the East side of the gardens of the Crescent houses which lies in the rear of this lot, as also shewn on the plan by the line drawn from West to East, with the benefit for ever hereafter of the same rights of way and passage, and other rights and easements over the residue of the said ground next the Grove, and the said planted ground in the rear, as are now enjoyed under the existing leases of the Crescent houses, and on the same terms and conditions; subject, nevertheless, to corresponding rights and easements in favour of the other Crescent houses, and to liberty for the purchaser of lot 1 to come upon the said planted ground at all reasonable times, to repair the main laid from the reservoir in lot 1, and the drain running through the same ground, as shewn upon a plan expressly referring to the sewers, drains, and water-courses, produced at this sale, making good any damage that may be sustained thereby. And the conveyance to the purchaser is to contain all proper reservations, covenants, and agreements for the above purposes."

1838.

DYKES v. BLAKE.

Some of the particulars issued contained both a plan of the lots [ut ante, p. 321], which was referred to throughout the particulars, and a plan of the drains and sewers [represented by the green, blue, and brown lines on the plan], also referred to throughout the particulars: but the greater part of the particulars issued contained only the first-mentioned plan, which was the only one with which the plaintiff was furnished. The plan of the drains and sewers was exhibited in a conspicuous situation on the wall of the auction-room at the sale.

Description of lot 7.

The particulars of lot 7 described the two houses comprised in that lot as let on lease for twenty-one years from Midsummer, 1826; the lease to be seen at Mr. Gregson's offices, and to be produced at the sale. The particulars of lot 8 stated the reservation as in lot 7, "and as shewn in the plan." The particulars of lots 9 and 10 referred to the plan in the same words.

The plaintiff attended and bid at the sale. Lot 12 was knocked down to him for the sum of 1,300*l.*, and lot 13 for the sum of 1,650*l.*, making together the sum of 2,950*l.*; and a contract was signed at the foot of one of the printed particulars, containing both the plans, by the plaintiff and the defendant, of which the following is a copy:—

Contract of purchase.

"Memorandum—That, at the auction before mentioned, I, the undersigned David Dykes, of &c., do acknowledge myself to be the highest bidder, and agree to become the purchaser of lots 12 and 13, as specified in this particular, at the sum of 2950*l.*; and, having paid the sum 590*l.* as a deposit of 20*l.* per cent. on the said purchase money, do agree to pay the sum of 2360*l.*, being the remainder of the purchase money, on or before the 24th June, 1836, under and subject to the before mentioned conditions."

The tenants of all the eight houses forming what are called the Crescent houses, and delineated and described in the plan annexed as lots 10, 9, 8, and 7, had a right of way across lot 13, to the extent mentioned in the passage

1838.

DYKES v. BLAKE.

in italics in the following clause, which was inserted in the leases of all those houses:—

"And also full and free liberty of ingress, egress, and regress to and for the person or persons for the time being occupying the said messuage or tenement and premises, and his and their servants, workmen, and others in his or their company, or without, and to and for carriages and horses to him or them belonging or by him or them retained or used, at all times during the continuance of this demise, in, through, over, or upon the road made and leading to and being in front of the said messuages or tenements, from the gate placed next the Grove at the North-west end of such road to the gate placed at the South-west end thereof: and also full and free liberty of way and passage to and for such person or persons for the time being occupying the said messuage or tenement and premises, and his and their respective families (not being servants) and friends, in, along, and over the walk of six feet wide made and now being in the rear and lying to the East of the ground inclosed by wire fences as the garden ground or ground to be occupied with such several houses; the same walk having been provided and set out as a promenade or walk for the use of the inhabitants of all the said houses and their respective families (not being servants) and friends, and extending from the North-east corner of the wall inclosing the garden ground of the messuage or tenement hereby demised or intended so to be, to the South-east corner of the fence which incloses the garden ground in the rear of the southernmost of the said eight houses; *and also full and free liberty to and for such person or persons for the time being occupying the said messuage or tenement and premises, and his wife, children, and friends, in their or one of their company, to pass and repass on the path commencing at the end of the said walk and leading to the stable-yard near thereto; and also full and free liberty to and for the servants of*

Reservation of right of way over lot 13, *not alluded to in the plan.*

1838.

DYKES v. BLAKE.

such person or persons so for the time being occupying the said messuage or tenement and premises, to pass and repass from the Grove or stable-yard, with gravel, earth, dung, or compost, to be placed or used in the said garden, in hand or wheelbarrows, but not otherwise, along and over the way and path already made and leading from the Grove to the said garden ground of the said messuage or tenement intended to be hereby demised: he, (the lessee), his executors, administrators, or assigns, paying to (the lessor), his heirs and assigns, yearly and every year, and on Midsummer Day in each year, one eighth part of the expense which he or they should pay, expend, and incur in the repairing, preserving, and keeping clean the said road and ground in front of the said houses, and the wood fences and gates which inclose the same, and of repairing, cleaning, and preserving the said walk in the rear of the said ground, and the said path to the said stable yard," &c. &c.

The leases of the eight houses in the Crescent were for the following terms—No. 1, for seventy years from Midsummer, 1818, determinable by the tenant at the end of twenty-one years—Nos. 2, 3, and 4, for seventy-one years from Michaelmas, 1817—Nos. 5 and 6 to yearly tenants—No. 7, for twenty-one years from Midsummer, 1826, determinable at the end of fourteen years—No. 8, for twenty-one years from Midsummer, 1835, determinable by the tenant at the end of three, seven, or fourteen years.

The plan [ante, p. 321] gives a correct delineation of the respective positions of the several lots. The lots 10, 9, 8, and 7, form the eight houses of the Crescent, the particulars of the leases of which are before stated, and all face the Grove. There is a carriage drive or sweep forming with the garden or plantation in front a semi-ellipse, and this drive leads from the Grove to the eight several houses. This drive or carriage sweep is divided on the plan by lines; but these lines are, and in the particulars are stated to be, imaginary, there being in fact no fence or other division of the drive or sweep itself.

1838.

DYKES v. BLAKE.

There is a garden at the back of each of the eight houses. At the Eastern extremity of these gardens, there is a gravel walk running from South to North, which is the walk of six feet wide mentioned in the leases. This gravel walk, together with the rest of the ground running from South to North at the back of the gardens, and extending eastward to the field forming part of lot 13, forms the promenade mentioned in the leases, and is common to all the eight houses forming the Crescent, for the purposes for which by the leases the use of the walk and promenade is granted.

The right of way upon which the questions in this case arose, is exercised in respect of each of the eight houses, by going out of the gardens at the back of the houses, and along the gravel walk or promenade, and thence along the way or path described in the leases as already made, and which still exists, across the field which forms part of lot 13, into the road delineated in the plan as running along the Northern side of lot 13, and so along the road, either to the stable-yard, which also forms part of lot 13, or to the Grove.

The said way or path runs across the said field at the North-east end of that field, nearly parallel to the boundary of the said stable-yard, which is at the North-east end of the said lot. There is an iron garden gate corresponding with the iron railing, and opening from the promenade into the pathway at the letter A in the plain, and a hand-gate opening from the pathway at the letter B in the plan into the said road on the Northern side of lot 13.

The letters A and B, the termini of the path in question, and the pink line which represents the path, were not on the plan annexed to the particulars issued as aforesaid; and there was not any delineation of that path on the said plan.

That portion of lot 13 over which the pathway extended was at the time of the sale, and still is, a grass field.

1838.

DYKES v. BLAKE.

Ninth condition—saving of errors.

The ninth condition of sale was—"That, if any mistake be made in the description of the premises, or any other error whatever shall appear in the particulars of the present sale, such mistake or error shall not annul the sale, but a compensation or equivalent shall be given or taken, as the case may require."

At the time of the sale, the tenant of the house which was the first house in the Crescent next to lot 13, and which was one of the houses in lot 10, was also in the occupation of lot 13 as tenant from year to year; and the nearest access from the garden at the back of his house, and from the gardens of the other Crescent houses, to the field, was through the iron gate marked A.

Notice was given by the plaintiff, before the action was brought, that he would not complete the contract, on the ground that the same was void on account of the said right of way; and a demand was made upon the defendant for the deposit and auction duty, with interest, which was refused by the defendant.

The plans and printed particulars were to be taken on the argument as if inserted in the case.

The case was argued in Hilary Term last, by *Wilde*, Serjeant, for the plaintiff, and *Wightman*, for the defendant.

Wilde, Serjeant, for the plaintiff.—The plaintiff, the purchaser of the lots 12 and 13, declines to complete the purchase on the ground that the particulars of sale, and the plan annexed thereto, were not so framed as to enable the purchaser to discover that the occupiers of the Crescent-houses had a right of way reserved to them over the Eastern side of lot 13 to the carriage road on the Northern side of the same lot. The plan exhibits a way from the Eastern extremity of lot 13 to the Grove, which is particularly referred to in the description of lot 12. Three questions are here presented for consideration,—first, whe-

1838.

DYKES v. BEAKE.

that the particulars give such a fair description of the premises as to enable the purchaser of lot 13, exercising reasonable caution, to discover that this right of way existed—secondly, whether the subsequent discovery of the existence of this right of way entitles the purchaser to rescind the contract and recover back the deposit, or whether the misdescription forms the subject of compensation under the ninth condition of sale—thirdly, whether the misdescription of the one lot entitles the purchaser to abandon the contract as to both.

1. The vendor has either been guilty of the grossest negligence, or of studiously concealing the right of way in question. The conditions of sale and the plans assume an appearance of marked particularity: not only do the latter minutely delineate the ways above ground, but also the drains and water-courses under ground. The purchaser had a right to presume that every way and every easement would be found upon the plan. He would naturally conclude that the right of way over lot 13 was only co-extensive with the dotted line in the plan. The division into moieties of the expense of keeping the road in repair would, amongst other circumstances, lead him to suppose that the only persons entitled to use the way were, the purchasers of lots 12 and 13. The fact of the same tenant occupying lots 10 and 13 would account for the existence of a communication between the two, without leading to an inference that the same right of way was reserved to the other houses in the Crescent. There is nothing in the description of the other lots to induce a supposition that they could have any interest in the way in question. There is nothing in the description of lot 13 in the particulars to lead a purchaser to suppose that the occupiers of the Crescent houses had any right of way over that lot, except the way marked as a part of the Crescent Sweep. The particulars of lots 12 and 13 refer to the particulars of lot 7, which, professing to set

1. Particulars not sufficiently explicit.

1838.

DYKES v. BEARD.

forth all the rights of way to which the Crescent-houses were entitled, makes express mention of the carriage sweep in front and of the promenade in the rear, but is altogether silent as to any right of way over lot 18; and with this description the plan which is referred to exactly corresponds. What purchaser, however vigilant and prudent he might be, would think it necessary to look further? Was he bound to go to the attorney's office and read the lease of lot 7? or could he be at all enlightened upon the subject by hearing it read by the auctioneer at the time of the sale?

2. Misdescription not the subject of compensation or equivalent.

3. The next question is, whether the misdescription is so material as to render the whole contract void, or one that may be compensated for under the ninth condition of sale. The lot in question is described in the particulars as a "first-rate building-plot," and as being "unquestionably as fine a situation for building as any in Camberwell." Having determined to purchase lot 18, and finding upon the plan the delineation of a right of way over a portion of it reserved to the owner of lot 12, it may be supposed (as was the fact) that the plaintiff became the purchaser of lot 12 also, in order to have it in his power to cure the inconvenience; and, having so done, he now finds that by means of the way that was not shewn either in the particulars or in the plan, and which divides from the front about one third of the entire lot, the nuisances of the whole of the Crescent-houses are imposed upon lot 18; and that in a way that is not only inconsistent with the comfortable enjoyment of the lot by a family, but totally destructive of its utility as a "first-rate building plot." Where the entire object of the purchaser is defeated by the subsequent discovery of a matter that is wilfully or negligently misrepresented in the particulars, he is clearly entitled to rescind the contract. Thus, in *The Duke of Norfolk* v. *Worthy*, 1 Camp. 337, 340, a farm was advertised for sale, and described in the particulars as being

1838.

DUKES v. BAKER.

about one mile from Horsham, and it turned out to be distant about three or four miles from that place. Among the conditions of sale was the following:—"If through any mistake the premises should be improperly described, or any error or mis-statement be inserted in this particular, such error shall not vitiate the sale thereof, but the vendor or purchaser, as the case may happen, shall pay or allow a proportionate value according to the average of the whole purchase-money, as a compensation either way." In an action brought by the purchaser to recover back his deposit, Lord Ellenborough said, that, "in cases of this sort, he should always require a simple and substantial performance of the particulars of sale, unless they were specifically qualified. Here there was a clause inserted, providing that an error in the description of the premises should not vitiate the sale, but an allowance should be made for it. This he conceived was meant to guard against unintentional errors, not to compel the purchaser to complete the contract if he had been designedly misled." And he left it to the jury to say "whether this was merely an erroneous mis-statement, or the misdescription was wilfully introduced, to make the land appear more valuable, from being in the near neighbourhood of a market town;" telling them, that, if the former case, the contract remained in force; but, in the latter case, the plaintiff was to be relieved from it, and was entitled to recover back his deposit." And the plaintiff had a verdict. With all proper deference to the opinion of Lord Ellenborough, it is difficult to perceive any just reason why a man should be permitted to take advantage of the *negligent* introduction of a mis-statement which has the effect of enhancing the supposed value of the property he offers for sale. When a merchant sells goods, he sells them with an implied warranty that they are what they profess to be, and are reasonably fit and proper for the purpose for which they are purchased. So of the vendor of an estate: the law warrant that the

1838.

DYKES v. BEAKE.

description he gives of it is reasonably fair and correct? In *Tomlins v. White*, 3 Smith, 489, Lord Ellenborough says: "A little more fairness on the part of auctioneers in the framing of their particulars would avoid all these inconveniences. There is always a suppression of the fair description of the premises, or there is something stated which does not belong to them; and, in favour of justice, considering how little knowledge the parties have of the thing sold, much more particularity and fairness might be expected of them. The particulars are in truth like the description in a policy of insurance, and the buyer knows nothing but what the party communicates." In *Coverley v. Burrell*, 5 B. & Ald. 257 (and see 2 Stark. N. P. C. 295), it appeared that, by a public act, the Waterloo Bridge Company were authorized to raise money for the purpose of completing their undertaking, either among themselves, or by the admission of new members, or by granting annuities for term of years, or for life. The act did not contain any provision that the annuities should or should not be redeemable. The company, however, in the original grant, reserved to themselves a power of redemption; and it was held, that, under these circumstances, an auctioneer putting up to sale one of these annuities, was bound in his particulars of sale to describe it as a redeemable annuity. And Abbott, C. J., said: "It is of great consequence to the public that auctioneers, who take upon themselves to describe in their particulars the property to be sold, should truly describe it: for, the buyers act on the faith of those descriptions. We ought not, therefore, to be astute in curing the defects which are apparent on the face of these particulars. It is true that an annuity may be redeemable, but it is not necessarily so; and it is not redeemable unless there be a special provision to that effect in the deed granting it. The purchaser had no reason to suppose in this case that the annuity was redeemable. He could not have learned that from the act of parliament, which con-

1838.

DYERS v. BLAKE.

tains no provision to that effect. And, under these circumstances, it appears to me that he might naturally expect that he was to purchase an absolute, and not a redeemable annuity. I am of opinion that it was incumbent on the auctioneer, who offered the annuity for sale, to describe it as a redeemable annuity." In *Dyer v. Hargrave*, 10 Ves. 507, Sir William Grant, M. R., says: "It is much too late to contend that every variance from the description will enable a man to resist the performance. The principle is, that, if he gets substantially that for which he bargains, he must take a compensation for a deficiency in the value. Whether the court has not in many cases gone beyond the spirit of that rule, is another consideration.... Whether the court ought to compel a defendant to take compensation for that which can hardly be estimated by pecuniary value, may admit of doubt." Has the plaintiff here got substantially that for which he bargained? Is the nuisance that has been palmed upon him a thing that can be estimated by any pecuniary compensation? In *Sherwood v. Robins*, M. & M. 194, 3 C. & P. 339, it was held that a condition in particulars of sale, that any error in the particulars shall not vitiate the sale, but a compensation shall be made, only applies to cases where the circumstances afford a principle by which this compensation can be estimated. And Lord Tenterden said: "In the case of a reversion simply expectant on the death of an individual, if a mistake be made in his age, a compensation may be made under the condition, for the difference of value may be computed; but, where there is an additional contingency, such as that of the birth of future children in this case, the difference of age alters the likelihood of that contingency; and in such a case therefore no estimate can possibly be made of the difference of value between the thing described and the thing sold, and the contract itself must be vacated." In *Jones v. Edney*, 3 Camp. 285, in the conditions of sale of the lease of a public-house, it was described as "a free

1838.

DYKES v. BLAKE.

public-house;" the lease contained a covenant that the lessee and his assigns should take their beer from a particular brewer; this lease was read over at the time of the sale by the auctioneer, who said mistakenly that it was a free public-house, and that the covenant about the beer had been decided to be bad: it was held that a purchaser *who heard the lease read over*, was not bound under these circumstances to complete the purchase, but was entitled to recover back the deposit. "Men cannot tell," said Lord Ellenborough, "what contracts they enter into, if the written conditions of sale are to be controlled by the babble of the auction room. But here the auctioneer at the time of the sale declared that he warranted and sold this as a free public-house. Under these circumstances, a bidder was not bound to attend to the clauses of the lease, or to consider their legal operation." *Flight* v. *Booth*, 1 Scott, 190, 1 New Cases, 370, is an authority directly in point. There, the particulars of sale described the premises (a house in the Piazza of Covent Garden) as calculated for an extensive business in the carpet, haberdashery, drapery, paper, floor-cloth, upholstery, *grocery, tea-trade*, &c.;" and stated that there was a clause in the lease prohibiting any "offensive trades" to be carried on upon the premises—adding, "they cannot be let to a coffee-house keeper or working hatter:" and, on the production of the lease, it was found to contain a clause of forfeiture for carrying on the trades of "a brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fish-monger, cheese-monger, fruiterer, herb-seller, coffee-house keeper, distiller, dyer, brazier, smith, tinman, farrier, dealer in old iron, pipe-burner, tallow-chandler, soap-boiler, working hatter," or suffering the premises to be used as "a shop or place for the sale of coals, potatoes, or any provisions whatever;" and also a clause prohibiting the lessee or his assigns from assigning the premises during the last seven years of the term, without

1838.

DYKES v. BLAKE.

the consent in writing of the superior landlord; and it was held that the misdescription in the particular was so material, and the difference of value so uncertain and arbitrary, that recourse could not be had to the compensation clause: and consequently the purchaser was entitled to rescind the contract, and recover back the deposit. Tindal, C. J., in delivering the judgment of the court, there says: "It is extremely difficult to lay down from the decided cases any certain, definite rule which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be ground of compensation only. All the cases concur in this, that, where the misstatement is wilful or designed, it amounts to fraud, and such fraud, upon general principles of law, avoids the contract altogether. But, with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases: some of them laying it down that no misstatements which originated in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only—*Duke of Norfolk* v. *Worthy*, 1 Camp. 337; *Wright* v. *Wilson*, 1 M. & Rob. 207: whilst other cases lay down the rule that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale—*Jones* v. *Edney*, 3 Camp. 285; *Wyring* v. *Haggart*, Ryan & Moody, 40; *Stewart* v. *Alliston*, 1 Merivale, 27. In this state of discrepancy between the decided cases, we think it is at all events a safe rule to adopt, that, where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having

1838.

DYKES v. BLAKE.

purchased the thing which was really the subject of the sale." The circumstance of the plaintiff not requiring to see the lease of lot 7, which was referred to in the particulars, was not such a degree of negligence on his part as to disentitle him to the relief he seeks. The same circumstance occurred in *Flight* v. *Booth;* and, adverting to that, Tindal, C. J., says: "The lease being in the hands of the vendor, he had peculiarly, and indeed exclusively, the means of knowledge of the exact restrictions contained in it. The purchaser at the auction had none; for, the reading the lease at the auction by the auctioneer has been decided to be no excuse for a misdescription of the terms of the lease in the particulars of sale. And, as to any laches on the part of the purchaser in not sooner demanding an inspection of the lease, which was urged as an argument on the part of the defendant, he had not the most distant reason to suspect any misdescription, until the abstract was delivered: and then the suspicion would come too late; for, the question is, whether he was bound or not at the time the contract was made."

3. Purchaser entitled to rescind the contract as to both lots.

The next question is, whether, the misdescription in the particulars of lot 13, being a material one, and not the subject of compensation under the ninth condition, the plaintiff has a right to abandon the contract in respect of both lots. The contract for the two lots was entire, and one deposit was paid upon the aggregate amount of the purchase money. Suppose a bill in equity filed by the defendant for a specific performance, and the contract as to one lot declared void by reason of the misdescription, how could the defendant have a decree for specific performance in respect of the other? It is not competent to the defendant, in the face of the written contract, to prove that the two lots were knocked down at separate and distinct prices—*Blagden* v. *Bradbear*, 12 Ves. 466. Whether the contract was entire or not would make, as it seems from the authorities, no difference. In *Chambers* v. *Grif-*

1838.

DYKES v. BLAKE.

fitks, 1 Esp. 149, the plaintiff purchased at an auction three houses in distinct lots and paid the deposit required by the conditions of sale; the defendant failing to make title to two of the houses within the time specified in the conditions, the plaintiff brought an action to recover back the deposit: and Lord Kenyon said: "When a party purchases several lots of this description at an auction, it must be taken as an entire contract; that is, that the several lots are purchased with a view of making them a joint concern. The seller therefore shall not, in case of any defect of his title to one part, be allowed to abandon that part at his pleasure, and to hold the purchaser to his bargain for the residue. From such a doctrine much injustice might result, as the part to which the seller could not make a title might be so circumstanced that without it the other parts would be of little or perhaps of no value; or it might leave it in the power of the seller, or any other person who might come to the possession of such part, to deprive the purchaser of every degree of enjoyment or beneficial use of that part which he had purchased." So, in *Gibson* v. *Spurrier*, Peake's Add. Cas. 49, it was held, that, where a man purchases at an auction two distinct lots which adjoin and which would be more conveniently occupied together, he is not obliged to go on with the purchase of either, unless the seller can make a good title to both. Lord Chancellor Brougham, in *Casamajor* v. *Strode*, 2 Mylne & Keene, 706, inclines to doubt the propriety of the decision in *Chambers* v. *Griffiths*: but he lays down the rule in nearly the same terms that Lord Kenyon did in that case. "It is a question of circumstances," he says, 2 M. & K. 725; "the lots may be connected from their nature; it may be shewn that the purchase of the one was made with reference to the other. A mere suggestion of the party, a mere statement of his inclination or fancy, will not be sufficient; nor may the proof of

1838.

DYKES v. BLAKE.

anything of a private nature, not known to the vendor, suffice: but where, upon matters known to both parties, he can ground his proof that the one transaction was dependent on the other, he complicates the two so as to make the contract one, although there may have been no express statement that he was to take none if he might not have all." And, after reviewing all the authorities upon the subject, both at law and in equity, his lordship adds: "It may therefore be concluded, that, in determining whether a purchaser who fails to obtain a good title to one lot, shall be let off from his contract for another, the whole circumstances may be examined in order to prove that the two contracts are one, by shewing that the two parcels are complicated together, and that, upon the whole transaction, the court will determine as a jury would, the question—did or did not the party purchase the one with reference to the other—would he or would he not have taken the one, had he not reckoned upon having the other also."

1. Particulars sufficient to enable purchaser to discover all rights and easements.

Wightman, contrà.—The particulars of lot 13 describe it as being sold "subject to the same rights of way and passage, and other rights and easements over the same, as are now enjoyed under the existing leases of the Crescent houses." This was sufficient notice that some rights of way existed over lot 13 independently of the Crescent sweep. The plaintiff had the means of ascertaining, and was bound to ascertain, what those rights were. But it is suggested that the absence of any indication of the particular right of way in question in the plan, was calculated to deceive and mislead the plaintiff. The plan, however, does not profess to set out *all* the ways. Had the plan exhibited *some* rights of way appertaining to the Crescent houses, and given no information as to others, the plaintiff might have had ground of complaint. But here the plan is altogether silent, and the particulars shew that there are some rights. Three things are pointed out in the parti-

1838.

DYKES v. BLAKE.

culars—first, that a right of carriage and foot way thirteen feet wide over lot 13, on the Northern boundary thereof, was reserved to the purchaser of lot 12—secondly, that a portion of the Crescent sweep was comprised within the boundary line of lot 13—thirdly, that, besides and independently of these, there were rights of way and other easements to which the Crescent houses were entitled. Two of these things appeared upon the plan; the third did not: the purchaser might and ought to have ascertained what those rights were, by reference to the leases of the Crescent houses.

2. No fraud being suggested, plaintiff not entitled to rescind the contract.

At all events, inasmuch as there is no suggestion that there has been any fraud or wilful misrepresentation in this case, the misdescription will at the most only entitle the plaintiff to compensation, pursuant to the ninth condition of sale: the plaintiff cannot rescind the contract. The rule is so laid down in *The Duke of Norfolk* v. *Worthy*. In *Wright* v. *Wilson*, 1 M. & Rob. 207, the plaintiff brought assumpsit to recover the amount of deposit agreed to be paid by the defendant as the purchaser of an estate sold by auction. The defence was, a misdescription of the estate in the particulars of sale. The particulars referred to a map as containing the description of the estate, and in that map a turnpike road was set out immediately adjoining the premises, whereas it turned out that there was no turnpike road within a quarter of a mile, and that what on the face of the map appeared as a turnpike road was in fact a mere foot-path. There was no evidence on either side to shew how the misdescription had originated: but the defendant's counsel offered to prove that the absence of the turnpike road rendered the estate utterly valueless to the purchaser. Parke, B., after referring to *The Duke of Norfolk* v. *Worthy*, said that "he should direct the jury, that, if the misdescription was a wilful and designed one, and had been inserted by any one employed to make the plan (?), or connected with the sale, that would

1838.

DYKES v. BLAKE.

be a fraud adopted by the vendors, and consequently would annul the bargain altogether, although the vendors themselves might not have been aware of the misdescription. But, if the jury thought that the misdescription had originated in *error*, there, however gross the negligence of the vendors might be, he was of opinion that they were bound to find their verdict for the plaintiff. Supposing, even, that the mistake were so important as the defendant's counsel offered to prove it to be, still the defendant must abide the event of having bought an estate without looking at it, and subject to such a condition as that now in question. And he was further of opinion that the onus of proving the fraud lay on the defendant, the presumption of law being against fraud." On this expression of the learned judge's opinion, the defendant agreed to a reference. [*Park*, J.—I do not think we ought to take that to be the learned Baron's deliberate opinion. I for one am not prepared to agree with it. *Flight* v. *Booth* seems to me to be founded upon substantial good sense. *Tindal*, C. J.—In *Wright* v. *Wilson* the misdescription was not in the thing itself, as here: I cannot under all the circumstances hold that case to be a safe guide.] In *Flight* v. *Booth*, the purchaser might, for any thing that appeared, have purchased the premises with a view to carry on one of the inoffensive trades to which the prohibition was afterwards found to extend: the object of the purchase would in that case be entirely defeated and destroyed. But here the diminished value of the land in consequence of the right of way, was clearly and easily susceptible of computation.

3. Both lots not affected by the misdescription.

Supposing the plaintiff entitled to rescind the contract as to lot 13, on the ground of the alleged misdescription, still that will not affect lot 12. There is nothing on the face of the case to indicate that the purchase of lot 12 at all depended upon the purchase of lot 13. In *Poole* v. *Shergold*, 2 Bro. C. C. 118, 1 Cox, 160, it was held, that if,

1838.

DYKES v. BLAKE.

upon a contract for a purchase in lots, no title can be made to some of the lots, and others have been deteriorated, a specific performance will be decreed, if the former have not been so blended with the others as to injure them. In *James* v. *Shore* 1 Stark. 426, it was held, that, where different lots are sold at an auction for different sums, the contracts are separate, both in law and fact; and in a special action for refusing to adhere to the conditions of sale, the plaintiff cannot consolidate the two contracts. And in *Lewin* v. *Guest*, 1 Russ. 325, it was held, that, a person who purchases two lots at an auction, is not justified in refusing to perform his contract for the purchase of one lot, because a good title is not shewn to the other lot. The only difficulty here arises from the circumstance of the two lots having been blended together in one contract: there is, however, no suggestion in the case that the purchase of the one lot was the consideration or inducement for the purchase of the other; therefore, the doctrine laid down by Lord Brougham in *Casamajor* v. *Strode* does not apply.

Wilde, Serjeant, in reply.—The law is clearly settled, that, if the description of the premises in the particulars be *fraudulent* in any respect, it avoids the contract; and that, if there be an *accidental misdescription* in a *material* point, the contract is equally avoided. Where the misdescription is unimportant, and the conditions of sale provide for it, compensation may be made for any diminished value of the premises; but that cannot apply where, as in this case, the purchaser has not the thing he purchased; a party cannot be compelled to accept a compensation where the whole object of the purchase is defeated by the misrepresentation. Reply.

The two lots are so blended together and united by the contract that they cannot be now disunited. The doctrine laid down by Parke, B., in *Wright* v. *Wilson*, is not one that

1838.

DYKES. v. BLAKE.

the court would be disposed to adopt without further consideration: it is totally inconsistent and at variance with all the cases. The rule is thus stated in Sugden's Vendor and Purchaser, 6th edit., *255*: "Where an estate is sold by auction, or before a Master, in lots, and the vendor has not a title to all the lots sold, equity will compel the purchaser to take the lots to which a title can be made, if they are not complicated with the rest; and will allow him a compensation pro tanto. But, if a title cannot be made to a lot which is complicated with the rest, the purchaser will not be compelled to accept the lots to which a title can be made. Thus, in *Poole* v. *Shergold*, 2 Bro. C. C. 118, 1 Cox, 273, Lord Kenyon said, if a purchase was made of a mansion-house in one lot, and farms &c. in others, and no title could be made to the lot containing the mansion-house, it would be a ground to rescind the whole contract." Regard being had to the relative situation of these two lots, and the right of way over lot 13 reserved to the occupier of lot 12, it is perfectly clear that the possession of the one created the desire for the other, and that the object of the purchase would be defeated by disuniting them.

Cur. adv. vult.

TINDAL, C. J., now delivered the opinion of the court:—

The question is, whether the plaintiff is at liberty, under the circumstances stated in the special case, to hold the contract of purchase into which he has entered to be altogether void, and to recover back the money paid to the auctioneer, as money had and received to his use. And this will depend on the determination of two questions—first, whether the description of the premises in the printed particulars and plans exhibited at the time of the sale, upon the faith of which the plaintiff made his purchase, was such that a prudent and vigilant man would enter into the contract without discovering the existence

1838.

DYKES v. BLAKE.

of the right of way over the land comprised in lot 13—secondly, whether such right of way, being found to exist, renders the purchase altogether useless for the purposes for which it was made, or only brings it under the head of misdescription, so as to form the subject of compensation or equivalent under the ninth condition of sale.

1. No sufficient disclosure of the right of way.

Upon the first of these questions, we are of opinion, that, looking at the printed particulars of sale, and the plans which accompany them, and which are referred to in the particulars, there is no sufficient disclosure of the existence of the right of way, to enable a bidder at the sale, by the exertion of ordinary vigilance and sagacity, to discover that such way exists.

Looking at the description of lot 13 given in the particulars themselves, it states that the lot will include the ground forming part of the Crescent sweep marked with an asterisk upon the plan, "subject for ever hereafter to the same rights of way and passage over the same as are now enjoyed under the existing leases of the Crescent houses." Now, in the first place, it is left in very great uncertainty whether the rights of way and passage there spoken of are to be exercised only over the sweep before the Crescent houses, or whether they are meant to extend over other and more distinct parts of the close. Admitting, however, the latter to be the proper (though it certainly is not the most obvious) construction, a reference to the other part of the particulars, so far from throwing any light upon the existence of the way now claimed, would tend to mislead the bidder at the auction. He would naturally refer for information to the description of the Crescent houses themselves, for the use of which the way is reserved. But the description of lot 7, so far from pointing at the way in question, mentions only the reservation of a right of way and passage over a different part of the premises, viz. such rights of way over the ground

1838.

DYKES v. BLAKE.

"next the Grove, and the planted ground in the rear, as are now enjoyed under the existing leases of the Crescent houses;" and, in all the subsequent lots—8, 9, and 10—the particulars expressly state that these lots are sold with similar rights and privileges, and subject to similar reservations as lot 7, "and as shewn in the respective plans." Now, upon referring to the plan, which is thus appealed to in the particulars, there is no trace whatever of any right of way over lot 13, for the use of the Crescent houses, except the carriage sweep. There is, indeed, a way over the close for the use of lot 12 clearly marked upon the plan, the presence of which would add strength to the conclusion that none other was intended to be reserved.

The only question, therefore, is, whether the exception in the description of lot 13 of the rights and easements now enjoyed under the existing leases of the Crescent houses, coupled with the notice in the description of lot 7, that the lease and agreement might be seen at the attorney's offices, and would be produced at the sale, imposed an obligation on the bidder to refer to the lease itself: and we think, under the circumstances, it did not.

Whatever might have been the case if the particulars had been confined to matter of description only, we think, that, as there is a direct reference and appeal to the plan, and the plan, whilst it discloses one way, altogether omits any trace of the way now claimed, the bidder at the auction could not be bound, in the exercise of ordinary prudence and vigilance, to look further; that the inspection of the plan would lull to sleep all suspicion; and that it was calculated, not simply to give no information, but actually to mislead. Particulars and plans of this nature should be so framed as to convey clear information to the ordinary class of persons who frequent sales by auction:

1838.

DYKES v. BLAKE.

and they would only become a snare to the purchaser, if, after the bidder has been misled by them, the seller should be able to avail himself of expressions which none but lawyers could understand or attend to.

We therefore think, upon the great head of inquiry, the existence of this right of way was not sufficiently disclosed to make it clear to persons of ordinary vigilance and caution, and that the contract is not binding on the plaintiff.

2. Misdescription so material as to entitle purchaser to retire from the contract.

The second point is—does the misdescription become matter of compensation and equivalent only? The 13th lot is stated in the particulars to be "a first-rate building-plot of freehold ground:" it is then described as having a frontage of eighty-six feet to the Grove, and ninety feet to the carriage sweep. The purchaser, therefore, might fairly conclude, as the seller intended him to conclude, that he might purchase the whole lot for the purpose of building. But the direction of the way claimed would render the close altogether useless for the very purpose for which it was known to be purchased.

3. Contract as to both lots at an end.

And, although it has been argued that the objection can apply at most to lot 13, and that the purchaser of lot 12 can have no right to rescind that purchase by reason of the misdescription in the particulars of lot 13, we answer, that, in this case, the seller has been contented to treat the two purchases as one contract, by entering into one agreement for the sale of both at once at the aggregate price; and, secondly, that the purchaser of lot 12, upon the facts of this case, may be reasonably understood to have purchased lot 13 in order that he might by unity of seisin extinguish the right of way over lot 13, which before belonged to lot 12, and thereby render lot 13 more valuable as building ground; an object and purpose which would be entirely defeated by the existence of the right of way above mentioned.

We therefore think the misdescription, however unin-

1838.

DYKES v. BLAKE.

tentional, has been such as to justify the plaintiff in saying that the lots which the seller is ready to convey are not the lots which he purchased, and consequently that he may recover back with interest the sums paid to the auctioneer.

Judgment for the plaintiff.

Thursday, May 10th.

The action having been improperly brought, under the 7 Geo. 4, c. 46, in the name of *two* persons as public officers, the 9th section only authorizing the action to be brought in the name of one—The court allowed the proceedings to be amended by striking out the name of one of the plaintiffs, on payment of costs.

HOLMES and Another *v.* BINNEY.

THIS was an action brought by the plaintiffs as public officers of a banking company established pursuant to the 7 Geo. 4, c. 46. The action having been commenced in the name of the *two* public officers appointed under the 4th section of the act, whereas the 9th section only authorized the institution and prosecution of suits &c. in the name of *one*—

Wilde, Serjeant, on a former day, obtained a rule nisi to strike out the name of one of the plaintiffs.—He cited *Baker* v. *Neaver*, 1 Dowl. 616, where the court of Exchequer allowed the proceedings in an action at the suit of assignees of a bankrupt to be amended by making the official assignee a joint plaintiff with the other assignees.

Andrews, Serjeant, shewed cause.—The application is entirely without precedent. The plaintiffs may relieve themselves from the difficulty they have placed themselves in by not attending to the directions given by the statute, by discontinuing the action. The defendant has been arrested at the suit of the two plaintiffs; and he ought not to be deprived of any advantage that may result to him from the plaintiffs' mistake.

Wilde, Serjeant, contrà, was stopped by the court.

1838.

HOLMES v. BENNEY.

TINDAL, C. J.—The sole object of this application is, to avoid the expense of a discontinuance; and I cannot think it unreasonable. The defendant must, however, be put into the same condition as if the action had been properly commenced at first, and must have all his costs occasioned by the amendment.

The rest of the court concurring—

Rule absolute.

COX *v.* CANNON.

Thursday, May 10th.

A warrant of attorney was executed by a defendant in custody under mesne process, in the presence of a party whom *he introduced as his attorney*, and who as such attested his execution of the instrument, but who afterwards turned out to be uncertificated. Upon motion to set aside the judgment and execution issued upon this warrant of attorney —Held, that the defendant was not under the circumstances entitled to relief—at least, without shewing that the fact of the individual who appeared for him being uncertificated, was unknown to him at the time.

PRICE, on a former day, obtained a rule calling upon the plaintiff to shew cause why the warrant of attorney given by the defendant (a prisoner) in this cause should not be set aside for irregularity, and why the defendant should not be discharged out of the custody of the sheriff of Surrey as to the execution issued upon the judgment entered up thereon. The motion was founded upon an affidavit of the defendant, stating that the person by whom the warrant of attorney was attested on his behalf was a prisoner and uncertificated.

Peacock shewed cause, upon an affidavit which stated that the deponent (who was clerk to the plaintiff's attorney) took the warrant of attorney to the defendant, who was then in gaol, to be executed; that he informed the defendant that it was necessary that his execution should be attested by an attorney on his behalf; that the defendant thereupon sent for a person whom he introduced as his attorney, and who as the attorney for the defendant attested the execution of the warrant of attorney; and that the deponent was not informed, nor did he know that

The circumstance of the attesting attorney being himself a prisoner, does not invalidate his attestation.

1838.

COX v. CANNON.

that person was a prisoner or uncertificated.—He submitted that the fact of the attesting witness being a prisoner was immaterial; and that the fact of the defendant having himself introduced the individual as his attorney, estopped him from now contending that he was no attorney: and he cited *Jeyes* v. *Booth*, 1 B. & P. 97: there, the defendant, a prisoner, being about to execute a warrant of attorney to confess judgment, was informed that it must be done in the presence of an attorney on his part, whereupon he produced a person as such, in whose presence he executed the instrument: upon a rule calling on the plaintiff to shew cause why the judgment entered up, and the ca. sa. issued thereon, should not be set aside with costs, on the ground that the person in whose presence the warrant of attorney had been executed by the defendant, was not an attorney—Eyre, C. J., said: "If, on the plaintiff objecting that the warrant must be executed in the presence of an attorney on the part of the defendant, the defendant accepts the instrument, and takes upon himself to find out the person in whose presence he ought to execute it, the court will not, for the purpose of such a motion as this, doubt that such person was an attorney. The present application is founded on an attempt to cheat the plaintiff."

Price, in support of his rule.—The rule of Hilary Term, 2 Will. 4, reg. 1, s. 72, is imperative: it provides that "no warrant of attorney to confess judgment, given by any person in custody of a sheriff or other officer upon mesne process, shall be of any force unless there be present some *attorney* on behalf of such person in custody, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant, before the same is executed; which *attorney* shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that

he subscribes as such attorney"(*a*). In *Verge* v. *Dodd*, Tidd's New Practice, 279, it was held by the court of King's Bench that the presence and attestation of an attorney who had not taken out his certificate within a year, was insufficient.

TINDAL, C. J.—The circumstance of the party attesting the signature of the defendant to the warrant of attorney being a prisoner, is wholly immaterial: and, with regard to the objection that he was uncertificated, it appears to me that the defendant is not entitled to avail himself of that objection, inasmuch as the supposed attorney was introduced as such by himself (*b*). I am unable to distinguish

(*a*) See the statute 1 & 2 Vict. c. 110, s. 9, by which, after reciting that "it is expedient that provision should be made for giving *every person* executing a warrant of attorney to confess judgment, or a cognovit actionem, due information of the nature and effect thereof," it is enacted, "that, from and after the time appointed for the commencement of the act (Oct. 1, 1838,) no warrant of attorney to confess judgment in any personal action, or cognovit actionem, *given by any person*, shall be of any force unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney."

And see s. 10, which enacts "that a warrant of attorney to confess judgment or cognovit actionem not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same."

(*b*) In Gillman v. Hill, Cowp. 141, where an application similar to the present was made on behalf of a defendant who had executed a warrant of attorney while in custody, without any attorney being present on his behalf, being told by the sheriff's officer that the attorney's clerk who attended for the plaintiff would do as well; it appeared from the defendant's affidavit that he was the more induced to execute the instrument, because he had before been in-

1838.

Cox
v.
CANNON.

this case from *Jeyes* v. *Booth*, except that here we have no absolute knowledge that the party intended to practise an imposition. He should, however, at least have sworn that he was as ignorant as the plaintiff's attorney of the fact of the individual he represented to be his attorney, being uncertificated. I think the rule must be discharged.

The rest of the court concurring—

Rule discharged (*c*).

formed, that, if he did execute it under an arrest, and without his attorney being present, it would be void. And Lord Mansfield said: "I shall say of these rules [E. 15 Car. 2, and E. 4 Geo. 2] what the court of Chancery has often said with respect to the statute of frauds—*that no rule of the court shall be made an instrument of fraud*. These rules were made for the protection of indigent defendants against the practices of hard, designing plaintiffs; and therefore have admitted of many exceptions under circumstances; as, where a person who is in prison at one man's suit executes a warrant of attorney to confess judgment to another who did not arrest him. There, the judgment is well given; for, the *cause* fails; and therefore, though within the *letter*, it is not within the *intent* of the rule. Much less will the court suffer a defendant to convert that which was meant for his protection into an instrument of fraud and deceit."

(*c*) The rule of court did not invalidate warrants of attorney executed without the presence of the defendant's attorney, where the defendant was in custody on final process—Watkins v. Hanbury, 2 Str. 1245, Fell v. Riley, Cowp. 281, Birch v. Sharland, 1 T. R. 715, Crompton v. Steward, 7 T. R. 19.

END OF EASTER TERM.

IN THE COMMON PLEAS.

TRINITY TERM, 1 VICTORIÆ.

THE JUDGES WHO SAT IN BANC DURING THIS TERM WERE— TINDAL, C. J., PARK, J., VAUGHAN, J., AND BOSANQUET, J.

Regulæ Generales.

Staying Proceedings.

1838.

In actions against acceptor of bill or maker of note.

IT IS ORDERED, that, in future, in any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only.

Denman	J. Vaughan.	J. Patteson.
N. C. Tindal.	J. Parke.	J. Gurney.
Abinger.	W. Bolland.	J. Williams.
J. A. Park.	J. B. Bosanquet.	J. T. Coleridge.
J. Littledale.	E. H. Alderson.	T. Coltman.

Payment of Money into Court.

Amendment of pleading rules.

WHEREAS it is expedient that certain of the rules and regulations made in Hilary Term, in the fourth year of the reign of his late Majesty, King William the Fourth, pursuant to the statute of the 3 & 4 Will. 4, c. 42, s. 1, should be amended, and some further rules and regulations made pursuant to the same statute:

1838.
REG. GEN.

IT IS THEREFORE ORDERED, that, from and after the first day of Michaelmas Term next, inclusive, unless parliament shall in the meantime otherwise enact, the following rules and regulations, made pursuant to the said statute, shall be in force:

17th and 19th rules of Hilary Term, 4 Will. 4, repealed.

First—IT IS ORDERED that the 17th and 19th of the General Rules and Regulations made pursuant to the statute 3 & 4 Will. 4, c. 42, s. 1, be repealed; and that, in the place thereof, the two following amended rules be substituted:—

For the 17th Rule.

Payment of money into court.

When money is paid into court, such payment shall be pleaded in all cases, and as near as may be in the following form, mutatis mutandis:—

Form of plea.

"C. D. ats. A. B. } "The —— day of ————.

"The defendant, by ————, his attorney [*or*, in person, &c.] says, [*or*, *in case it be pleaded as to part only*, *add*, 'as to ———*l.*, being part of the sum in the declaration (*or*, ——— count) mentioned,' *or* 'as to the residue of the sum of ———*l.*'] that the plaintiff ought not further to maintain his action, because the defendant now brings into court the sum of ———*l.* ready to be paid to the plaintiff: And the defendant further says that the plaintiff has not sustained damages [*or*, *in actions of debt*, 'that he never was indebted to the plaintiff"] to a greater amount than the said sum of &c., in respect of the cause of action in the declaration [*or*, 'in the introductory part of this plea'] mentioned: And this he is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his action thereof." (1)

For the 19th Rule.

Proceedings by plaintiff after payment of money into court.

The plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same

(1) See Finlayson v. M'Kenzie, 5 Scott, 20, 3 New Cases, 824.

1838.

Reg. Gen.

by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty in that case to tax his costs of suit, and, in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed; or the plaintiff may reply "that he has sustained damages [*or*, "that the defendant was and is indebted to him," *as the case may be*,] to a greater amount than the said sum;" and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

General issue by statute.

IT IS FURTHER ORDERED, that, in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of any act of parliament, he shall insert in the margin of such plea the words "By statute," otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament; and such memorandum shall be inserted in the margin of the issue and of the Nisi Prius record.

Payments credited in particulars of demand need not be pleaded.

In any case in which the plaintiff (in order to avoid the expense of a plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money (*2*).

(2) Considerable doubts had existed amongst the judges as to whether or not payment of the whole or of a part of the plaintiff's demand (whether before or after action brought) might under the rules of Hilary Term, 4 Will. 4, be given in evidence under non assumpsit. See Lediard v. Boucher, 7 C. & P. 1; ——— v. Padden, Sewell's Pr. Dig. 1835, 275, n.; Cousins v. Paddon, 2 C. M. & R. 547, 4 Dowl. 488; Palfrey v. Sill, 2 Scott 159, n.; Shirley v. Jacobs, 2 Scott, 157, 2 New Cases, 88, 4 Dowl. 136, 7 C. & P. 3; Richardson v. Robertson, 1 M. & W. 463, 1 Tyr. & G. 279, 5 Dowl. 82; Goldsmid v. Raphael, 3 Scott, 385, 2 New Cases, 310; Ernest v. Brown, 4 Scott, 385, 5 Scott, 491; Belbin v. Butt, 2 M. & W. 422, 5 Dowl. 604; Nicholl v. Williams, 2 M. & W. 758, 6 Dowl. 167; Cooper v. Morecraft, 3 M. & W. 500, 6 Dowl. 562.

1838.

REG. GEN.

But not to apply to claim of balance.

Payment, in reduction of damages or debt, not to be allowed.

But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums.

Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt; but shall be pleaded in bar (3).

DENMAN.	J. VAUGHAN.	J. PATTESON.
N. C. TINDAL.	J. PARKE.	J. GURNEY.
ABINGER.	W. BOLLAND.	J. WILLIAMS.
J. A. PARK.	J. B. BOSANQUET.	J. T. COLERIDGE.
J. LITTLEDALE.	E. H. ALDERSON.	T. COLTMAN.

(3) See Coates v. Stevens, 2 C. M. & R. 118, 3 Dowl. 784; Nicholl v. Williams, 2 M. & W. 758, 6 Dowl. 167; Kenyon v. Wakes, 2 M. & W. 764, 6 Dowl. 105.

Friday, May 25th.

A writ of capias and a rule to return it were delivered to the sheriff at the same time. The sheriff *two* days afterwards returned non est inventus:—The court refused to interfere.

EVENS *v.* JAMES.

PIKE moved to set aside for insufficiency the sheriff's return to a writ of capias, and also for an attachment against the sheriff—of Buckinghamshire. It appeared that the writ and a rule to return it (an eight day rule) were delivered to the sheriff at the same time, and that the sheriff, on the second day after such service, returned non est inventus. It was contended that the sheriff had no right to return the writ until the expiration of the eight days, the plaintiff being entitled to the benefit of his exertions to apprehend the defendant during the intervening period.

TINDAL, C. J.—I do not understand the practice of delivering the writ to the sheriff with one hand, and a rule to return it with the other. If the sheriff has been guilty

of any neglect of duty, the party is not without remedy: but I cannot say that he is in contempt.

1838.

EVENS v. JAMES.

The rest of the court concurring—

Rule refused.

WILLIAM LLOYD and JOHN LLOYD PRICE, Demandants; MARY NICHOLAS, Deforciant.

Friday, May 25th.

IN Hilary Term last, *Chilton*, on behalf of H. E. Shadwell, who was admitted to defend as landlord in an action of ejectment brought in the court of Queen's Bench by one David Thomas for the recovery of property in Carmarthenshire, moved for a rule calling upon the lessor of the plaintiff in that ejectment to shew cause why the clerk of the peace for the county of Carmarthen should not be directed *to indorse on the roll of fines* levied at the Autumn Great Sessions for that county in the year 1830, *all the proclamations* of a fine then and there levied, wherein William Lloyd and John Lloyd Price were demandants and Mary Nicholas deforciant, *and also on the back of the writ of covenant and other proceedings of the said fine, so as to perfect the same.* The motion was founded upon the affidavit of one Price, formerly an attorney of the court of Great Sessions for the several counties of Carmarthen, Pembroke, and Cardigan, wherein he stated, that he was, in the year 1830, employed by Mary Nicholas, since deceased, to levy a fine sur conuzance de droit come ceo &c., with proclamations, of and upon certain premises situate in the parish of Newchurch, in the county of Carmarthen, of which Mary Nicholas was then seised, so as to perfect a conveyance then made and executed thereof by her to

A fine was levied at the Autumn Great Sessions held for the county of Carmarthen in 1830 (the last Sessions held there under the Welsh Judicature), and was duly proclaimed at those Sessions. At the Autumn Assizes for that county in 1831, proclamation was made of all fines levied at the Autumn Great Sessions for 1830; and it appeared that the fine in question was then upon that roll. The second proclamation alone was indorsed upon the foot or inrolment; the indorsement of the first and third having been omitted to be made by the officer whose duty it was to do so, viz. the deputy prothonotary (afterwards clerk of assize for the South Wales circuit):—The court allowed the proclamations to be indorsed by the clerk of the peace, into whose hands the records of fines for the county of Carmarthen, by the 11 Geo. 4 & 1 Will. 4, c. 70, came on the death of the late deputy prothonotary—and this after an ejectment brought to recover the premises comprised in the fine.

1838.

LLOYD Dem., NICHOLAS Def.

Writ of covenant.

Dedimus potestatem.

William Lloyd and John Lloyd Price; that he accordingly obtained from the cursitor of the said court of Great Sessions a writ of covenant for that purpose, which was tested and issued on the 5th August, 1830, and also a writ of dedimus potestatem; that Mary Nicholas duly acknowledged the said fine before two of the commissioners for that purpose named in the writ of dedimus potestatem, on the 24th August, 1830, and signed the præcipe and concord; that the Autumn Great Sessions for the county of Carmarthen for the year 1830 (being the last court of Great Sessions holden at Carmarthen under the Welsh Judicature (4) commenced and were held at Carmarthen, before Mr. Serjeant Goulburn, the only judge of the said court of Great Sessions, on the 30th August in that year, and continued till the 4th September; that Thomas Jones, late of Carmarthen, attorney, and now deceased, acted as the deputy prothonotary in the courts of Great Sessions for the several counties of Carmarthen, Pembroke, and Cardigan, for many years previous and up to and including the said Autumn Great Sessions, 1830, and as such deputy prothonotary had the custody of the records of fines and recoveries and all other records of the said courts of Great Sessions, and by himself and his clerks transacted in the prothonotary's office at Carmarthen the whole of the business of the said courts of Great Sessions of or belonging to the said office of prothonotary, and as such deputy prothonotary drew up and ingrossed chirographs of fines and exemplifications of recoveries, and made all other entries relative to fines and recoveries levied or suffered in the said courts of Great Sessions for the said counties of Carmarthen, Pembroke, and Cardigan; that the writ of covenant so issued by William Lloyd and John Lloyd

Jones, deputy-prothonotary, had custody of the records of fines.

Writ of covenant duly returned,

(4) The Welsh Judicature was abolished by the statute 11 Geo. 4 & 1 Will. 4, c. 70, s. 14. The act came into operation on the 12th October, 1830.

1838.

LLOYD Dem., NICHOLAS Def.

Price against Mary Nicholas, was returned by the sheriff of the county of Carmarthen at the Autumn Great Sessions held at Carmarthen in 1830, and was afterwards taken by deponent to the compounder of fines and recoveries in the said court of Great Sessions, and duly compounded; that the writs of covenant and dedimus potestatem, with the præcipe and concord, and an affidavit of one of the commissioners of the due acknowledgment of the concord by Mary Nicholas annexed, were afterwards taken by deponent before Mr. Serjeant Goulburn, the presiding judge of the said Autumn Great Sessions held at Carmarthen in the year 1830, who signed his allocatur under the concord; that deponent immediately afterwards took the said writs of covenant and dedimus potestatem, præcipe, and concord, and affidavit of acknowledgment, to the prothonotary's office at Carmarthen, and handed them to the said Thomas Jones, the then deputy prothonotary, and requested him to annex the same to the roll of fines levied at such Autumn Great Sessions, and then informed him that it was the wish of the parties to the fine that the same should be duly proclaimed, and particularly requested him to get the same proclaimed before the close of the then Great Sessions, and also to proclaim the said fine at the two following Assizes; that the said Thomas Jones then annexed the said writs of covenant and dedimus potestatem and other proceedings to the said roll of fines levied at the said Autumn Great Sessions, and informed deponent that the said fine would, with other fines annexed to such roll, be proclaimed before the close of the Sessions, but that there was no occasion for this deponent to leave with him any express direction as to the proclamations of the said fine, it being, as the said Thomas Jones then told the deponent, the universal practice of the said courts of Great Sessions to proclaim *all* fines levied in those courts, whether it was necessary

fine compounded for,

and fiat obtained.

Practice of the court as to making proclamations of fines.

1838.

LLOYD Dem., NICHOLAS Def.

or not (5)—adding, that, if the deponent wished so to do, and would attend in court on the last day but one of the Sessions, he might hear the fine proclaimed; that deponent accordingly attended in court on the last day but one of the said Autumn Great Sessions, and was present in court when the said roll of fines levied at the said Autumn Great Sessions was proclaimed in open court, *and heard the proclamation of the fine in question;* that deponent did not apply for or ever receive from the said Thomas Jones the chirograph of the said fine, and believed that it was never ingrossed; that he had been informed and believed that Thomas Jones was, upon the abolition of the

Deponent attended in court, and heard the *first proclamation* made.

No chirograph ingrossed.

(5) This statement as to the practice of proclaiming all fines, was corroborated by the affidavit of one Robinson, many years a clerk in the office of Jones, the deputy prothonotary; and also by the affidavits of two attorneys who had for many years practised in the court: all agreeing "that it was the invariable practice of the said courts of Great Sessions to proclaim *all* fines levied in those courts, whether proclamations were necessary or not to give effect to the same; and that it was the practice of the said courts to make the first proclamation of a fine at the Sessions in which the same had been levied, and the second and third proclamations at the two succeeding Sessions."

In Oldnall's (afterwards Serjeant Russell) Practice of the Court of Great Sessions on the Carmarthen Circuit, p. 520, the course of proceeding is thus adverted to:—"By the statute 34 & 35 Hen. 8, c. 26, s. 41, it is enacted that all fines levied before the justices of the Great Sessions in Wales, 'with proclamation made the same Sessions that the fine is ingrossed, and in two other Great Sessions then next to be holden within the same county, shall be of the same force and strength to all purposes as fines levied with proclamations before the justices of the common place in England.' The fine is proclaimed according to the provisions of this statute at three different Sessions; and, as the proclamations are made, which is done by the secondary at the second court of the fifth day of the Sessions, they should be duly indorsed on the back of the foot, or, as it is sometimes called, the inrolment, by the prothonotary."

In Doe d. Hatch v. Bluck, 2 Marsh, 170, 6 Taunt. 485, it was held that the indorsement of proclamations on a fine is not alone sufficient evidence of their having been made; nor are they sufficiently proved by the production of the chirograph having them indorsed.

1838.

LLOYD, dem., NICHOLAS, def.

Welsh judicature, appointed clerk of assize for the South Wales Circuit, and acted as such clerk of assize, and also as associate, from 1830 to the time of his death, which happened in 1836, and that it was a part of his duty as such clerk of assize and associate to cause proclamations to be made of all fines which had been levied in any of the courts of Great Sessions held within that circuit (6); that the records of the said court of Great Sessions for the county of Carmarthen continued in the prothonotary's office, in the custody of the said Thomas Jones till his death; and that, upon his death, or soon afterwards, the same were handed over to the custody of the clerk of the peace for the county of Carmarthen (7).

Jones's duty, as clerk of assize to proclaim fines.

There was also an affidavit of one John Thomas, a clerk in the office of Jones, the late deputy prothonotary, stating, that, as such clerk, deponent was in the habit, under Jones's direction, of ingrossing the foot or conclusion of

As to the general state of the records of fines in the court.

(6) The 28th section of the 11 Geo. 4 and 1 Will. 4, c. 70, enacts, "that, upon all fines which now are or before the commencement of this act shall be duly acknowledged in Chester or Wales, proclamation may be made at the successive Assizes to be holden under his majesty's commission within the county of Chester and principality of Wales, before any judge of such Assize, during the continuance of such his commission, in the same manner and form, and with the same force and effect, as if the same had been proclaimed before the justices of Chester and Wales, or any of them; any law or usage to the contrary notwithstanding."

(7) The 27th section of the above statute enacts "that the records, muniments, and writings of the several courts abolished by this act shall, unless otherwise provided by law, be kept by the same persons and in the same places as before the passing of this act; and that the court of Common Pleas shall have the like power and authority to amend the records of fines and recoveries passed heretofore in any of the courts abolished by this act, as if the same had been levied, suffered, or had in the court of Common Pleas: provided always, that, in case of the death of any such person before any other provision shall have been made for keeping such records, muniments, and writings, the custody thereof shall be with the clerks of the peace of the several counties to which counties the same shall respectively belong."

1838.

LLOYD, dem., NICHOLAS, def.

fines levied in the said courts of Great Sessions, upon applications for office-copies of fines levied in the said courts of Great Sessions, after the abolition of the Welsh judicature; that deponent had inspected many of the rolls of fines in the said prothonotary's office, of former years, and found, on such inspection, that the foot or conclusion of such fines was but in a few instances made out, and, when office-copies of fines were applied for, the proclamations belonging to any particular fine were taken from a footing which might be annexed to another fine in the same roll; that, after the Autumn Assizes held for the county of Carmarthen in 1831, the said Thomas Jones drew out and handed to the deponent for ingrossment the foot or conclusion of one of the fines annexed to the roll of fines levied at the Autumn Great Sessions held at Carmarthen in 1830, with minutes of the proclamations, and deponent, by the desire of Jones, ingrossed on parchment such foot or conclusion, and indorsed on the back of it the minutes of the proclamations so drawn by Jones, and which foot or conclusion was by his direction affixed to the fine to which it belonged, annexed to the said roll of fines levied at the Autumn Great Sessions in 1830 (8); that, when Jones handed to deponent the said minutes of proclamations, he informed him that they would do for and applied

Minute of proclamations.

(8) The following is a copy of the minutes referred to :—

Minute of proclamations.

"According to the form of the statute.

"The first proclamation was made on Friday, the third day of September, in the year, place, and Sessions within written.

"The second proclamation was made on Thursday, to wit, the third day of March, in the Assizes holden at Carmarthen, in and for the county of Carmarthen within written, on Wednesday, to wit, the second day of March, in the first year of the reign of the king within specified, pursuant to the statute.

"The third proclamation was made on Monday, to wit, the eighteenth day of July, in the Assizes holden at Carmarthen, in and for the said county of Carmarthen, on Saturday, to wit, the sixteenth day of July, in the second year of the reign of the king within specified, pursuant to the statute."

1838.

LLOYD, dem., NICHOLAS, def.

to all the fines annexed to the roll of fines levied at the Autumn Great Sessions held for Carmarthen in 1830; that, when Jones drew up the said minutes of proclamations, he complained to the deponent of the neglect of another clerk in the office, named Evans, (since dead), in not having indorsed on the back of the said roll of fines levied at the said Autumn Great Sessions for the county of Carmarthen in 1830, a minute of the third proclamation of such roll; that Jones afterwards, in the presence of deponent, directed Evans to indorse on the said roll of fines a memorandum of the third proclamation, which Evans then promised to do, but which he neglected to do; that the fine levied by Mary Nicholas at the Autumn Great Sessions held for the county of Carmarthen in 1830, *is* (9) annexed to the roll of fines levied at those Great Sessions, and that such roll is now in the custody of the clerk of the peace for the county of Carmarthen; that the said roll contains fifteen fines, and that it appears by the roll that the foot or conclusion to either of those fines has never been ingrossed and annexed thereto, excepting the foot or conclusion to the fine before mentioned; that an entry of the second proclamation is indorsed on the back of the roll of fines levied at the Autumn Sessions, 1830, as follows:— "2nd proclamation made on Thursday, 3rd March, in the first year of King William the 4th, before Sir William Bolland, knight, during sitting 1st court of that day;" that the same is the only entry on the back of such roll; that deponent had on several occasions searched the rolls of fines in the prothonotary's office, levied at the Carmarthenshire Great Sessions, for the purpose of making extracts and office-copies of the same, and some of very old date, but in no instance did deponent recollect having seen any entry either of the first, second, or third proclamations on the backs of the rolls, excepting entries of the proclamations which had taken place of fines since

The roll of fines levied at the Autumn Great Sessions, 1830, has but one foot, though fifteen fines.

Second proclamation duly entered.

(9) Vide post, p. 365.

1838.

LLOYD, dem., NICHOLAS, def.

the Autumn Sessions, 1830; and that, in some cases, one footing only was annexed to a fine in a whole roll of fines, with proclamations indorsed on such footing, and in those cases deponent was directed to make out the proclamations for office-copies of other fines from such footing.

Gibbs's affidavit —Fines levied at the Carmarthen Autumn Great Sessions, 1830, proclaimed at the Autumn Assizes, 1831.

There was also an affidavit of Mr. Gibbs, Mr. Justice Bosanquet's clerk, stating that he attended at Carmarthen at the Autumn Assizes for 1831, and, as crier, then and there gave notice in open court of proclaiming all fines levied at the Autumn Great Sessions for Carmarthenshire in 1830, in the usual manner; and that thereupon the roll of fines was read out and proclamation made in court there before Mr. Justice Bosanquet, being then the judge of assize for the said county, by Thomas Jones, since deceased, the then clerk of assize for the South Wales Circuit, who then had the custody of the said fines.

In support of the application, the case of *Evans*, demandant, *Griffith*, tenant, *Jones*, vouchee, 2 M. & Scott, 383, 9 Bing. 311, was cited. There, a recovery was duly suffered in 1804, in the court of Great Sessions at Carnarvon, but the deputy prothonotary of that court had neglected to enter it upon the roll of the court, as it was his duty to do, and for which he had received the accustomed fee: and this court granted a rule (pursuant to the powers vested in them by the 27th section of the 11 Geo. 4 and 1 Will. 4, c. 70, the act for the abolition of the Welsh judicature,) directing the officer in whose custody the records of the court of Sessions were, to make the necessary entry nunc pro tunc; although the tenant to the præcipe was since dead, and no writ of seisin had been sued out—it not being usual in practice to issue such writ. [*Tindal*, C. J.—There, every thing had been done that was requisite to give validity to the recovery, except the mere entry of the proceedings upon the roll: and there was no lis pendens. Here, you are asking us to direct one officer to do that which another ought to have done; and

1838.

LLOYD, dem., NICHOLAS, def.

that after an action of ejectment has been brought, to which the fine if amended will operate as a complete bar.] The action was not commenced until long after the time when the fine, if duly perfected, would have been a bar. [*Bosanquet*, J., referred to *Milbanke* v. *Jolliffe*, 2 B. & P. 580, n.—*Tindal*, C. J.—I think, before we grant the rule, we should have an affidavit to shew what was the object of the fine, and when the defect was first discovered, and also to shew that the fine in question was upon the roll when it was handed by Jones to his clerk, Thomas, for the purpose of indorsing thereon the minutes of proclamations mentioned in his affidavit.]

On a subsequent day the required affidavits were produced. From one of these (the affidavit of Mr. Price) it appeared that Mary Nicholas became entitled to the property in question under a settlement made in 1770 by one James Nicholas, her great uncle; that John Thomas, the uncle of David Thomas, the lessor of the plaintiff in the now pending ejectment, in the year 1829, brought an ejectment for the recovery of the premises in question, to which he claimed to be entitled as the heir ex parte maternâ of John Nicholas, the person last seised, which action came on to be tried at the Autumn Great Sessions for Carmarthen in that year; that, on that occasion, a verdict was found for the lessor of the plaintiff, which verdict was afterwards set aside, and a new trial directed, by the court of Exchequer; that the said John Thomas gave notice of trial at the Spring Great Sessions in 1830, but subsequently countermanded it, and no further proceedings were taken by him in that action; that Mary Nicholas, from that time till her death in 1837, continued in the undisturbed possession of the premises; that Mary Nicholas, shortly after the trial of the former ejectment, acting upon the advice of two conveyancers of eminence, levied the fine in question, as a course preferable to the filing a bill for

State of the title.

1838.

LLOYD, dem., NICHOLAS, def.

the perpetuation of testimony; that H. E. Shadwell (who was admitted to defend as landlord in the ejectment now pending) was the devisee in fee of the premises in question under the will of Mary Nicholas; and that the defect in the proceedings of the fine was not discovered till November last.

Defect discovered last November.

An affidavit was also produced of Owen Lloyd—who had been crier of the court of Great Sessions for the counties of Carmarthen, Pembroke, and Cardigan, from the year 1822 down to and including the Autumn Great Sessions held in and for those counties in 1830, when the said courts were abolished—stating, that, as such crier, he was in the habit at each court of Great Sessions of giving notice in open court of the proclamation of all fines levied in those courts, and that thereupon the rolls of fines were read out by Mr. John Willy, the secondary of the said courts of Great Sessions, and proclamation made in court; that it was the practice of the said courts of Great Sessions to make the first proclamation of a fine at the Sessions in which it was levied, and the second and third proclamations at the two succeeding Sessions; that deponent attended at Carmarthen at the Autumn Great Sessions for the year 1830, and as crier gave notice in open court of proclaiming all fines levied at the Autumn Great Sessions for Carmarthenshire, in 1830; and that thereupon the roll of fines levied at such great Sessions was read out, and proclamation made in court there before Mr. Serjeant Goulburn, being then the judge of the said court, by the said John Willy, the said Secondary of the court (10).

Practice of the court as to proclaiming fines.

Proclamation of all fines duly made at the Autumn Great Sessions, 1830.

It was also sworn by Thomas, that, when Jones, the late deputy prothonotary, drew out and handed to him the

(10) It appeared that attempts had been made to obtain an affidavit of what took place upon this occasion from Mr. Willy; but he was suffering under paralysis to such an extent as to render it impossible to procure his testimony.

1838.

LLOYD, dem., NICHOLAS, def.

minutes of proclamations referred to in the deponent's former affidavit [ante, p. 360, n.], the fine in question was annexed to the said roll of fines levied in the said Autumn Great Sessions in 1830.

The rule was thereupon granted, and on the following day enlarged until the second day of Easter Term—David Thomas undertaking that he would not, on the trial of the ejectment, take any objection to the admission of parol evidence that all the proclamations of the said fine were in fact duly made in open court, and would waive all objections on the trial to the want of or deficiency in any minute or record of such proclamations; and also undertaking to admit, without further proof thereof, an office-copy of the affidavit of Mr. Gibbs, and not to object thereto that Mr. Gibbs ought to be called.

Rule enlarged.

Monday, May 7th.

E. V. Williams, in Easter Term, shewed cause.—The court have no power to do that which is prayed by this rule; and, if they had the power, they would not be warranted, under the circumstances, in exercising it. The motion is, not that a fine may be *amended*, but that a record of a fine may be *made* for the parties—that an act which ought to have been done several years ago by an officer who has since died, and whose office no longer exists, may be done by the hand of the clerk of the peace. The act of parliament upon which the case cited (*Evans*, demandant, *Griffith*, tenant, *Jones*, vouchee, 2 M. & Scott, 383, 9 Bing. 311) turned, merely authorizes the court to *amend* fines: here the fine is a perfectly good fine at common law; the proclamations are no part of it, neither is the entry on the roll; they are only a mode of proof. "When the statute [4 Hen. 7, c. 24] gives to the party, if he pleases, proclamations upon the fine, this is another thing ordained for another purpose, viz. to give notice to strangers; so that it is quite a different matter, and the fine and proclamations are not become one entire thing,

1838.

LLOYD, dem., NICHOLAS, def.

or one same record. For, the fine is by itself one matter of record perfect and full before the proclamations made, and it binds the parties and the right of the land between them before the proclamations, and the proclamations which are made afterwards are another matter of record, which have another entry in the record after the fine. Wherefore, although the proclamations are grounded upon the fine, and are pursuant to it, yet they are several from the fine, and they and the fine are several matters of record, for which reason error in them is not error in the fine." *Fish* v. *Broket*, Plowd. 265. Here, it appears that the *second* proclamation only is indorsed on the roll of fines; Mr. Price, the attorney for the conuzor, swears that he was in court, and heard the *first* proclamation made; but there is no evidence as to the *third* proclamation; all that appears, is, that the fines levied at the Autumn Great Sessions held at Carmarthen in 1830, generally, were proclaimed in the usual manner at the Autumn Assizes for 1831; and there is nothing to shew that this particular fine was then upon that roll. In *Pettus* and *Godsalve's* Case, 13 Rep. 54, a mistake had been made in the third proclamation at the foot of the fine, of the year in which it was made, and the fourth proclamation was left out: " but, because, upon the view of the proclamations upon dorsis, upon the record, et nota finis ejusdem termini per Justiciarios, remaining with the chirographer, and the book of the said chirographer, in which the said proclamations were first entered, it appeared that the said proclamations were rightly and duly made, therefore it was adjudged that the errors or defects aforesaid should be amended, and made to agree as well with the proclamation upon record of the said fine, and entry of the said book, as with the other proclamations in dorsis super pedes aliorum finium of the same term." That is the only instance to be found in the books of an amendment of this nature rendered necessary by the omission of the officer; and there there

1838.

LLOYD, dem., NICHOLAS, def.

were ample materials to amend by: whereas here the only materials upon which the court are invited to take so solemn a step, are, loose statements as to the supposed invariable practice of the court, when the very statements themselves shew that the proceedings have been almost from time out of mind conducted with an utter disregard of all order and regularity. The court are called upon to act upon parol testimony which the party to be affected by it has had no means of testing by cross-examination. See the hardship upon the party: he might have been induced to bring his ejectment, by the discovery that the fine in question, being only a fine at common law, was no bar to him as heir in tail. [*Tindal*, C. J.—The same plea of hardship might with equal justice be urged in every case in which an amendment of a fine or a recovery has been allowed. The law of non-claim was always a very hard law. But men are not to lose their rights, because the officer of the court has been guilty of a culpable dereliction of duty. The party who opposes this application will be in no worse condition if we grant that which is asked, than he would have been in had all been rightly done at first.] In *Ex parte Motley*, 2 B. & P. 455, the court refused to amend a fine passed two years back, by altering the surnames of the deforciants, though it was sworn that a wrong name had been inserted by mistake. And Lord Alvanley said: "The consequences of such an amendment must be obvious to every body. Suppose an ejectment brought [precisely this case], and a search made for a fine, and none found; and then, when the parties come to trial, a fine is produced which escaped the search, because the name had been changed. These amendments ought not to be made, except in cases where the alteration is of such a nature as that no one can be misled by it. Indeed, I will go further, and say, that, if the court of Common Pleas had allowed such an amendment as is now applied for, I, as Master of the Rolls, would not have granted a new writ

1838.

LLOYD, dem., NICHOLAS, def.

of covenant." The parties here have brought the difficulty upon themselves by their own laches, by neglecting the ordinary means of insuring regularity; for, the attorney for the conuzor states that he never applied for a chirograph, and believes none was ever made.

THE COURT observed that it was consistent with the affidavits produced in support of the motion, that the fine in question was not on the roll of fines at the time that roll was proclaimed: they therefore directed that the rule should stand enlarged until the second day of Trinity Term; that the clerk of the peace for the county of Carmarthen should in the meantime produce the roll of fines on which this fine was entered, and deposit the same with Mr. Sherwood, the officer of the court; and that Shadwell (the party applying) should be at liberty to file additional affidavits, if necessary, to prove that the fine in question was upon the roll at the time of the proclamations.

The roll was now produced in court, and its appearance was such as to confirm the statements upon which the rule was founded.

Friday, May 25th.

Williams, in addition to his former argument, cited the case of *Hopwood* v. *Watts*, 5 B. & Ad. 1056, 3 N. & M. 146. There, the action was commenced on the 31st March, 1827, issue was joined in Easter Term of the same year, and notice of trial given for the sittings after that term; the issue was entered as of Easter Term, 1827, and docketed at the same time. The plaintiff obtained a verdict at the sittings after Hilary Term, 1828, for 75*l.*, and his costs were taxed by the Master, and final judgment signed on the 31st May, 1828, when the Master gave his allocatur for 158*l.* damages and costs. Final judgment was entered on the roll, and carried into the Treasury chamber on the 9th December, 1828; but the judgment, according to a

1838.

LLOYD, dem., NICHOLAS, def.

practice said to have prevailed for one hundred years, was not docketed as required by the 4 & 5 W. & M. c. 20, s. 2. On application to the court in 1834, to order the judgment to be docketed nunc pro tunc—it was held that they had no power to make such order.

Chilton, in support of his rule, relied upon *Evans*, demandant, *Griffith*, tenant, *Jones*, vouchee, and submitted that the present application fell completely within the reasoning of the court in giving judgment in that case; and he commented upon the absence of any affidavit on the other side to shew that any peculiar hardship would be occasioned by the rule being made absolute, or that David Thomas was induced by the imperfect state of the record of the fine, to conclude that it would not operate in bar of his claim, and therefore to bring the action; and contended that the affidavits in support of the application were as clear and explicit as could in such a case be expected.

TINDAL, C. J.—This is an application to the court to cure a misprision of the deputy prothonotary of the court of Great Sessions for the county of Carmarthen, in having omitted in the customary manner to indorse the proclamations of a fine levied in that court upon the roll and other proceedings of the fine. It appears by the affidavits filed in support of the application, that the course of practice in the court of Great Sessions for Carmarthen, was, to make the first proclamation of *all* fines on the last day but one of the Sessions at which they were levied, and the second and third at the two succeeding Sessions, and that one indorsement of the proclamations having been made served for all the fines upon that roll. Looking at the roll itself, we find indorsed upon it one proclamation only, viz. the *second*. But we find indorsed on the foot of one of the fines on the roll a minute that *all* the proclamations

1838.

LLOYD Dem., NICHOLAS Def.

or not (5)—adding, that, if the deponent wished so to do, and would attend in court on the last day but one of the Sessions, he might hear the fine proclaimed; that deponent accordingly attended in court on the last day but one of the said Autumn Great Sessions, and was present in court when the said roll of fines levied at the said Autumn Great Sessions was proclaimed in open court, *and heard the proclamation of the fine in question;* that deponent did not apply for or ever receive from the said Thomas Jones the chirograph of the said fine, and believed that it was never ingrossed; that he had been informed and believed that Thomas Jones was, upon the abolition of the

Deponent attended in court, and heard the *first proclamation* made.

No chirograph ingrossed.

(5) This statement as to the practice of proclaiming all fines, was corroborated by the affidavit of one Robinson, many years a clerk in the office of Jones, the deputy prothonotary; and also by the affidavits of two attorneys who had for many years practised in the court: all agreeing "that it was the invariable practice of the said courts of Great Sessions to proclaim *all* fines levied in those courts, whether proclamations were necessary or not to give effect to the same; and that it was the practice of the said courts to make the first proclamation of a fine at the Sessions in which the same had been levied, and the second and third proclamations at the two succeeding Sessions."

In Oldnall's (afterwards Serjeant Russell) Practice of the Court of Great Sessions on the Carmarthen Circuit, p. 520, the course of proceeding is thus adverted to:—"By the statute 34 & 35 Hen. 8, c. 26, s. 41, it is enacted that all fines levied before the justices of the Great Sessions in Wales, 'with proclamation made the same Sessions that the fine is ingrossed, and in two other Great Sessions then next to be holden within the same county, shall be of the same force and strength to all purposes as fines levied with proclamations before the justices of the common place in England.' The fine is proclaimed according to the provisions of this statute at three different Sessions; and, as the proclamations are made, which is done by the secondary at the second court of the fifth day of the Sessions, they should be duly indorsed on the back of the foot, or, as it is sometimes called, the inrolment, by the prothonotary."

In Doe d. Hatch v. Bluck, 2 Marsh, 170, 6 Taunt. 485, it was held that the indorsement of proclamations on a fine is not alone sufficient evidence of their having been made; nor are they sufficiently proved by the production of the chirograph having them indorsed.

1838.

LLOYD, dem., NICHOLAS, def.

Welsh judicature, appointed clerk of assize for the South Wales Circuit, and acted as such clerk of assize, and also as associate, from 1830 to the time of his death, which happened in 1836, and that it was a part of his duty as such clerk of assize and associate to cause proclamations to be made of all fines which had been levied in any of the courts of Great Sessions held within that circuit (6); that the records of the said court of Great Sessions for the county of Carmarthen continued in the prothonotary's office, in the custody of the said Thomas Jones till his death; and that, upon his death, or soon afterwards, the same were handed over to the custody of the clerk of the peace for the county of Carmarthen (7).

Jones's duty, as clerk of assize to proclaim fines.

There was also an affidavit of one John Thomas, a clerk in the office of Jones, the late deputy prothonotary, stating, that, as such clerk, deponent was in the habit, under Jones's direction, of ingrossing the foot or conclusion of

As to the general state of the records of fines in the court.

(6) The 28th section of the 11 Geo. 4 and 1 Will. 4, c. 70, enacts, "that, upon all fines which now are or before the commencement of this act shall be duly acknowledged in Chester or Wales, proclamation may be made at the successive Assizes to be holden under his majesty's commission within the county of Chester and principality of Wales, before any judge of such Assize, during the continuance of such his commission, in the same manner and form, and with the same force and effect, as if the same had been proclaimed before the justices of Chester and Wales, or any of them; any law or usage to the contrary notwithstanding."

(7) The 27th section of the above statute enacts "that the records, muniments, and writings of the several courts abolished by this act shall, unless otherwise provided by law, be kept by the same persons and in the same places as before the passing of this act; and that the court of Common Pleas shall have the like power and authority to amend the records of fines and recoveries passed heretofore in any of the courts abolished by this act, as if the same had been levied, suffered, or had in the court of Common Pleas: provided always, that, in case of the death of any such person before any other provision shall have been made for keeping such records, muniments, and writings, the custody thereof shall be with the clerks of the peace of the several counties to which counties the same shall respectively belong."

1838.

LLOYD Dem., NICHOLAS Def.

or not (5)—adding, that, if the deponent wished so to do, and would attend in court on the last day but one of the Sessions, he might hear the fine proclaimed; that deponent accordingly attended in court on the last day but one of the said Autumn Great Sessions, and was present in court when the said roll of fines levied at the said Autumn Great Sessions was proclaimed in open court, *and heard the proclamation of the fine in question;* that deponent did not apply for or ever receive from the said Thomas Jones the chirograph of the said fine, and believed that it was never ingrossed; that he had been informed and believed that Thomas Jones was, upon the abolition of the

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1838.

LLOYD, dem., NICHOLAS, def.

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1838.

LLOYD, dem., NICHOLAS, def.

docketed, the defendant might give in evidence payment of bond and other specialty debts, which exhausted all the assets.

COLTMAN, J.—The argument that struck me the most, was, that there is here nothing to amend by. But, upon looking at the roll that has been produced before us by the clerk of the peace, I think we have something to amend by, viz. the foot or conclusion of the last fine upon that roll. A minute in the book of the officer would be enough to amend by. No hardship pressing peculiarly upon the party opposing the amendment has been pointed out to us, and I see no reason why the record should not be perfected as prayed.

Rule absolute—that the clerk of the peace for the county of Carmarthen should indorse on the roll of fines &c. (as prayed); that the costs of David Thomas of and occasioned by the application should abide the event of the cause; and that the roll of fines should be returned to the clerk of the peace for the said county (12).

(12) See the next case.

LEWIS EVANS, Demandant; DAVID DAVIES and MARGARET, his Wife, Deforciants.

A fine was levied at the Autumn Great Sessions held for the county of Cardigan in 1830 (the last Sessions held there under the Welsh Judicature). The roll of fines levied at those Sessions was then proclaimed, and also at the Autumn Assizes for that county in 1831; and it appeared that the fine was then upon the roll of fines levied at the Autumn Great Sessions for 1830. There was no evidence as to any proclamation having been made at the Spring Assizes, 1831; and there was no indorsement of any of the proclamations—the officer whose duty it was to indorse them on the roll, having omitted to do so:—The court allowed the proclamations to be indorsed by the clerk of the peace, into whose hands the records of fines for the county of Cardigan, by the 11 Geo. 4 & 1 Will. 4, c. 70, came on the death of the late deputy prothonotary—and this after an ejectment brought to recover the premises comprised in the fine.

THIS was a fine levied in the court of Great Sessions for the county of Cardigan, and duly acknowledged

1838.

EVANS, dem., DAVIES, def.

before Goulburn, Serjeant, the presiding judge, on the 19th August, in the Autumn Great Session for that county in the year 1830.

Upon affidavits stating when and how the fine was levied, and what was the course of the court with regard to the proclamation of fines (as in the preceding case), and shewing that proclamation of the fines levied at the Sessions in which the fine in question was acknowledged, viz. the Autumn Great Sessions for Cardigan in 1830, was duly made, and also that, at the Autumn Assizes held for that county, before Bosanquet, J., in 1831, proclamation was duly made of all fines levied at the Autumn Great Sessions held for that county in 1830(13), but that Mr. Jones the officer whose duty it was to do so, had not indorsed upon the back of the foot or conclusion of the fine *any* of the proclamations, and had neglected to send the chirograph to the cousor's attorney; and that the fine in question was found upon the roll of fines levied at the Autumn Great Sessions held for the county of Cardigan in the year 1830—

Thursday, Nov. 8th.

John Evans, in Michaelmas Term, 1838, moved for a rule calling upon the deforciants, and also upon the lessors of the plaintiff in an action of ejectment pending in the court of Exchequer (for the recovery of the premises mentioned in the fine), wherein John Doe, on the demises of Benjamin Davies and Lord Kensington, was plaintiff, and Lewis Evans was defendant, to shew cause why the clerk of the peace for the county of Cardigan should not be directed to amend the fine by indorsing the proclamations, as in *Lloyd*, dem., *Nicholas*, deforciant, ante, p. *355*.

TINDAL, C. J.—The materials are not quite so ample as in the case of *Lloyd* and *Nicholas*. However, the rule may go.

(13) This fact was supplied by the affidavit of Mr. Gibbs.

1838.

EVANS, dem., DAVIES, def.

Monday, Jan. 28, 1839.

E. V. Williams shewed cause.—It does not appear that the officer has been guilty of such neglect or misprision (14) as to induce the court to interfere: it is not his duty to make out the chirograph until he is asked for it; and here it does not appear that it had ever been applied for. In the case cited, it was proved to the satisfaction of the court that the first and third proclamations were in fact made, and the second was indorsed. The materials, therefore, were complete. Here, none of the proclamations are indorsed, and the affidavits at the most only shew ground for presuming that the first and the third had been duly made; the second is left a total blank: it is not even sworn that Jones was instructed to proclaim this fine.

John Evans, in support of his rule.—It sufficiently appears from the affidavits that it was the practice of the court of Great Sessions to proclaim all fines a first time at the Sessions at which they were levied, and to make the second and third proclamations at the two succeeding Sessions; and that there is no distinction there, as there is in this court, between fines with and fines without proclamations. The only difference between the case of *Lloyd*, dem., *Nicholas*, def., and this case, is, that there the second proclamation was indorsed on the foot of one of the fines—a circumstance that is wanting here. But the fine in question is found upon the proper roll, and in the custody of the proper officer, viz. the clerk of the peace, into whose custody it passed on the decease of Jones the deputy prothonotary. [*Tindal*, C. J.—It is not because the proclamations ought to have been made, that we are to presume that they have been duly made.—*Bosanquet*, J. It appears that the first and third proclamations were made—the first, at the Autumn Great Sessions, 1830—the third at the Autumn Assizes in 1831: the latter is proved

(14) See the statute 8 Hen. 6, c. 12.

1838.

EVANS, dem., DAVIES, def.

by the affidavit of Mr. Gibbs, who, having devoted much attention to the subject (15), would probably have been attracted by any irregularity in the proceeding, particularly as the thing occurred to him for the first time under the new jurisdiction.] The statute 34 & 35 Hen. 8, c. 26, s. 41, provides that all fines levied before the justices of the Great Sessions in Wales "with proclamation made *the same Sessions that the fine shall be ingrossed, and in two other Great Sessions then next to be holden* within the same county, shall be of the same force and strength to all purposes as fines levied with proclamations before the justices of the common place in England;" and the 28th section of the 11 Geo. 4 & 1 Will. 4, c. 70, provides, that, upon all fines acknowledged in Wales, promation may be made *at the successive Assizes* to be holden within the principality, in the same manner and form and with the same effect as if the same had been proclaimed before the justices of Wales: and the affidavits shew that that course has invariably been followed.

TINDAL, C. J.—There can be no doubt but that this fine was properly levied at the Autumn Great Sessions held for the county of Cardigan in the year 1830, and was then duly proclaimed: nor can there be a doubt that it was also proclaimed at the Autumn Assizes for 1831. The only question is, whether or not there is sufficient evidence before us of its having been proclaimed at the intervening Spring Assize. But, when we find that it has been the uniform course to proclaim all fines at the Sessions at which they are levied and at the two succeeding Sessions, that this practice is recognized and confirmed by the statute by which the jurisdiction was remodelled, and that the first and third proclamations have been duly made, I think it is not too much to assume that the officer whose

(15) Mr. Gibbs, in 1821, published a very useful volume of practical instructions for suffering common recoveries.

1838.

EVANS, dem., DAVIES, def.

duty it was to do so did make the second proclamation in due course, though he has from some unexplained cause omitted to record the fact on the foot or inrolment of the fine. It seems to me, that, in allowing this defect to be supplied, we shall not be going further than we did in the former case.

VAUGHAN, J.—I am of the same opinion. It appeared in *Lloyd* v. *Nicholas*, that the same officer whose duty it was to proclaim the fines at Cardigan, did, at the Spring Assizes for Carmarthen in 1831, proclaim the fines: and therefore I think it is no very violent presumption to conclude that he did his duty in this respect at Cardigan.

BOSANQUET, J.—We ought to be extremely cautious in taking such a step as this. But I do not think we ought under the circumstances to refuse the relief prayed.

ERSKINE, J., concurred.

Rule absolute (16).

(16) The following cases are referred to in *Bohun's* Case, 5 Rep. 43. b.

"In Essex, Dowling's Case, &c. Fine levied Hil. 6 E. 6, certified in a writ of error, Mich. 24 & 25 Eliz., and certificate by writ of certiorari Pasch. 26 El. and Trin. 26 El. ex assensu omnium justiciar' de Reg' Banco, et Com' Banco, et Baron' de Scaccario, pending the writ of error, proclamation indorsed sup' pedem finis were amended according to the proclamation on the note of the fine remaining with the chirographer, ut patet per record'.

"In Suffolk, Down's Case, Mich. 38 & 39, by the motion of Williams, Serjeant-at-Law, proclam' pedes finis were amended per proclam' notæ, in his verbis, super pedem finis proclam' was indorsed to be made 30 Julii, which was after Trin. Term ended; et super notam finis fuit 30 Jun.; and well and duly done, et emendatur per curiam after writ of error brought, and that assigned for error."

By the statute 27 Eliz. c. 9, s. 2, it is provided that no fines levied in Wales or the counties palatine shall be reversed or reversible by any writ of error "for false or incongruous latin, razure, interlining, misentering of any warrant of attorney or of *any proclamation*, misreturning or not returning of the sheriff, or other want of form in words, and not in matter of substance."

1838.

EVANS, dem., DAVIES, def.

Williams asked leave to discontinue the action of ejectment *without costs*.

Evans submitted that there was no ground laid for the application.

Ejectment discontinued without costs.

TINDAL, C. J.—I think the application is reasonable, and the opposition to it, to say the least, very ungracious. The party waits until the action is brought, and then comes to ask that which certainly is a very great favour. I think he ought to consent either that the ejectment be discontinued without costs, or to try it without setting up the fine as an answer. It would be unjust in the extreme to make the lessors of the plaintiff pay costs of a discontinuance that is induced solely by the altered position in which the amendment of the fine places them.

Evans ultimately consented that the action should be discontinued without costs.

Rule accordingly.

FISHER *v.* WARING.

Saturday, May 26th.

The court refused to discharge a rule for changing the venue from London to Glamorganshire, obtained upon the usual affidavit, although it was sworn that the cause of action arose partly in that county and partly in Ireland.

THE venue in this case was originally laid in London, but had been changed to Glamorganshire upon the usual affidavit.

Talfourd, Serjeant, on the part of the plaintiff, now moved to discharge the rule for changing the venue, upon an affidavit that the cause of action arose partly in Glamorganshire and partly in Ireland.—In *Neale* v. *Nevill* and *Savory* v. *Spooner*, 6 Taunt. 565, 2 Marsh. 278, it was held, that, where the cause of action arises in a foreign country, the plaintiff may retain the venue without any undertaking to give material evidence. In *Wilkinson* v. *Tattersal*, 3 Bing. 429, 11 Moore, 328, an af-

1838.

FISHER v. WARING.

fidavit that the cause of action arose in Lancashire and not elsewhere, having been answered by an affidavit that it arose on a contract for the purchase of 500 bags of cotton, to be shipped at Trieste and delivered at Liverpool, this court refused to remove the venue from London to Liverpool. And in *Hope* v. *Bennet*, 2 N. R. 397, the court discharged a rule for changing the venue, upon an affidavit of the plaintiff that the cause of action arose principally in Ireland.

TINDAL, C. J.—To entitle the plaintiff to bring back the venue, there must be an affidavit of special circumstances: the language of the new rule (Hilary Term, 2 Will. 4, s. 103) is very general.

The rest of the court concurring—

Rule refused.

Saturday, May 26th.

Upon application for leave to issue a distringas to compel appearance, it must be made to appear that the defendant is not out of the Kingdom.

NORMAN WINTER.

WILDE, Serjeant, moved for leave to issue a distringas to compel an appearance. The affidavit upon which he moved stated a variety of circumstances tending to shew that the defendant was keeping out of the way to avoid service of process; but did not state the deponent's belief that she was not out of the kingdom.

PER CURIAM.—That fact must be supplied (17).

(17) See Fraser v. Case, 2 M. & Scott, 720: and see Esdaile v. Marshall, 5 Scott, 487, 4 New Cases, 172, 6 Dowl. 400.

1838.

Thursday, May 31st.

BAILLIE *v.* KELL and HOGG.

To account in assumpsit for the breach of an agreement to continue the plaintiff in the employ of the defendants (members of a company) as an accountant, the defendants peaded, that the plaintiff received monies of the company for which he neglected to account—that he made wrongful and improper payments on account of the company—that he made false, fraudulent, and improper entries in the books and accounts, and rendered false, fraudulent, and fabricated accounts of pretended payments—that he made false, fraudulent, and ficitious representations of things done by him as accountant—that he refused to obey the commands of the defendants—that his accounts were so incorrectly, unskilfully, and improperly kept as to be utterly valueless to the defendants—and that he was unfit and incompetent to perform the duties of an accountant. The plaintiff replied de injuriâ. At the trial the defendants proved that the plaintiff had made false entries in the books and accounts of the company, and had concurred with certain of the directors in making false representations as to the state of the company's affairs; *wherefore the defendants discharged the plaintiff from their service*:—Held, that, the several allegations of misconduct in the plea being distinct and independent, the defendants, on proof of enough to justify their putting an end to the contract, were entitled to the verdict.

Held also, that the fact of their having, at the time of dismissing the plaintiff, assigned a totally different reason for so doing, did not preclude the defendants from setting up the alleged acts of misconduct as a defence at the trial.

To a common count for work and labor as an accountant, the defendants pleaded non assumpsit, and payment. It appeared that 180*l.* had been received by the plaintiff on account of salary:—Held, that the defendants were entitled to shew, in reduction of damages, that the plaintiff's conduct had been fraudulent, and that the sum received by him covered the actual value of his services, although there was no plea of fraud.

ASSUMPSIT on a special contract to employ the plaintiff as an accountant.

The first count of the declaration stated, that, before the commencement of this suit, to wit, on the 7th of April, 1835, in consideration that the plaintiff, at the request of the defendants, had then become and was the servant of and employed by the defendants as an accountant, at and for a certain yearly salary or wages, to wit the salary or wages of 400*l.* per annum, to be therefore paid by them the defendants to the plaintiff, and had then promised the defendants to serve them in the capacity and upon the terms aforesaid, until the 1st September in the year aforesaid, and so on afterwards, from year to year, for so long as the plaintiff and the defendants should respectively please, until the expiration of the current year of the said service and employ, commencing on the 1st September in each year, the defendants then promised the plaintiff to continue him in their service and employ in the capacity and upon the terms aforesaid until the said 1st September in the year aforesaid, and so on afterwards from year to year, for so long as the plaintiff and the defendants should respectively please, until the expiration of the current year of the said service and

1838.

BAILLIE v. KELL.

employ of the plaintiff, commencing on the 1st September in each year: and although the plaintiff, confiding in the promise of the defendants, did continue in the service and employ of the defendants, in the capacity and on the terms aforesaid, from the day and year first aforesaid, until the 1st September in the same year, and from thence for a long space of time, to wit, from thence until the 3rd of January, 1837: and although the plaintiff was, on &c., and always afterwards, ready and willing, and then offered to remain and continue in the service and employ of the defendants in the capacity and on the terms aforesaid, for the remainder and until the expiration of the then current year of his service and employ, to wit, until the 1st September, 1837; whereof the defendants then and at all times afterwards had notice; yet the defendants did not nor would continue the plaintiff in their service and employ for any longer period than at or any time after the said 3rd January, 1837; but, on the contrary thereof, then and before the expiration of the then current year of the plaintiff's service and employ, to wit, on &c., wholly refused to permit the plaintiff to continue any longer in their service and employ, and then discharged him therefrom without any reasonable or probable cause whatsoever, and from thence hitherto wholly neglected and refused to retain and continue him in their service and employ: by means whereof the plaintiff was deprived of the wages, salary, profits, and advantages, of a large amount, to wit, the amount of 400*l.*, which he otherwise might and would have derived and acquired from being continued in the service and employ of the defendants as aforesaid, and which the defendants refused to pay or allow; and the plaintiff from that time became wholly unemployed, and was likely so to continue.

The declaration also contained a common count for wages as an accountant.

The defendants pleaded non assumpsit to the whole declaration, and five special pleas to the second count—secondly, a traverse of the consideration—thirdly, that the plaintiff caused and procured the defendants to promise as in that count alleged, and the defendants were induced to make the promise through and by means of the fraud, covin, and misrepresentation of the plaintiff and others in collusion with him—fourthly, that the defendants did not discharge the plaintiff from their service and employ, modo et formâ.

The sixth plea stated, that, before the discharge of the plaintiff from the service and employ of the defendants, as in the first count mentioned, to wit, on the 1st September, 1834, and on divers other days and times between that day and the day when the plaintiff was so discharged, the plaintiff did, in the way of his said service and employ as such accountant, receive divers sums of money of and from divers and very many persons for and on account of the defendants, which said several monies the plaintiff did not nor would duly and properly account for to the defendants, although he was then and often afterwards requested by the defendants so to do; and the plaintiff then also wrongfully, improperly, and wilfully made divers wrongful and improper payments with other monies of the defendants; and then also made divers and very many false, fraudulent and improper entries in divers books and accounts of and belonging to the defendants, and made up and rendered divers false, fraudulent, and fabricated accounts of payments pretended to have been made, and other matters and things pretended to have been done by him, but which in fact were not made or done; and the plaintiff then also made divers false, fraudulent, and fictitious representations to the defendants of divers matters and things pretended to have been done by him, and of divers other matters and things relating to the several businesses and transactions in which he was engaged as such accountant; and the

1838.

BAILLIE v. KELL.

plaintiff also misbehaved and misconducted himself in the said service and employ of the defendants in this, to wit, that the plaintiff wilfully and improperly refused to obey the just and reasonable commands of the defendants; that all and every the accounts kept and things done by the plaintiff as such accountant, were so incorrectly, unskilfully, and improperly kept and done, that the same and every part thereof were utterly useless and of no value whatever to the defendants; and that the plaintiff was always, from the time of the making of the promise of the defendants in the first count mentioned, until and at the time of the discharge of the plaintiff in that count mentioned, wholly unfit, incompetent, and unable to perform the duties of such accountant, and totally unfit to act in the capacity aforesaid: whereupon the defendants, when and as soon as they discovered the premises aforesaid, to wit, on &c., refused to suffer or permit the plaintiff to continue any longer in their, the defendants', service and employ, and discharged the plaintiff therefrom, and from thence hitherto refused to retain or continue the plaintiff in their, the defendants', service and employ, as it was lawful for them to do for the cause aforesaid—verification.

To the second count the defendants also pleaded payment, and set-off.

The plaintiff replied de injuriâ to the sixth plea, and joined issue upon the others.

The cause was tried before Tindal, C. J., at the sittings at Westminster after last Hilary Term. The facts that appeared in evidence were as follow:—

On the 1st September, 1834, certain persons (viz. Messrs. Pooley, Blain, and White, and Dr. Epps) met for the purpose of forming a joint stock company to be called "The Essex Marine Salt Company," agreed to various resolutions, and prepared prospectuses after the most approved fashion. Pooley was appointed the managing director,

1838.

BAILLIE v. KELL.

with a salary of 800*l.* per annum; Messrs. Blain and White and Dr. Epps were appointed directors, with salaries of 150*l.* per annum; one Amies and another individual were respectively appointed secretary and manager of the works, with a salary to each of 600*l.* per annum; and Baillie, the plaintiff, was appointed the accountant of the concern, at a salary of 400*l.* per annum. These several appointments were made by resolutions signed by all the then directors.

Certain salt-works at Maldon, in Essex, were taken by the company; but it did not appear that they had ever been worked by them.

In the months of April and July, 1835, the defendants Kell and Hogg respectively became shareholders in the company.

In December in that year, Pooley, the managing director, and Amies, the secretary, in order to revive the drooping credit of the concern, and to give the shares a lift in the market, prepared and published the following circular:—

"Essex Marine Salt Company.

"The directors of the Essex Marine Salt Company have the pleasure of informing the shareholders that the works at Maldon are proceeding with the utmost despatch; and that the first section will be completed, at the farthest, by the end of February, 1836.

"This section will produce weekly 350 tons.

"Three other sections of the same dimensions, each yielding the same quantity as the first, will form the establishment, and will be completed within the estimated expense of 8*l.* per share, beyond which sum no further call will be made, it being adequate for every purpose.

"During the progress of the first section, with a view of more accurately testing the principle, and of ascertaining the expenses of making salt, it was considered advisable to fit up the old works, and the result has been most satisfactory; for, although the improved method could

1838.

BAILLIE v. KELL.

only be applied partially, from the want of room, the imperfect construction of the old pans and flues, the scanty supply of sea-water, in the absence of an adequate reservoir, and all those conveniences which the new works will supply, seven hundred and thirty-five tons have been manufactured and sold—viz.

	£	s.	d.
" 75 tons fine large old Maldon Crystal, at 6*l.* 6*s.*	471	10	0
" 660 Ditto common, at 1*l.* 10*s.* . .	990	0	0
	1462	10	0
" Total expenses of making .	284	16	3
" Net Profit .	£1177	13	9

thus clearly establishing the statements put forth in the second prospectus, and placing beyond question the accuracy of the profits therein described.

" The directors deem it right to apply the net proceeds of the salt sold in the payment of a dividend of 7½ per per cent. on the two instalments of 3*l.* each per share, on the 5th January, 1836: and, although it has been made under every disadvantage, the shareholders will perceive what the results must be from the weekly production of from 1200 to 1400 tons, even at the same cost of manufacture; but which will certainly be much diminished in working upon an extended plan: therefore, the directors have the fullest confidence of exceeding the profits stated in their prospectus.

"The dividends will be paid at the company's offices, between the hours of eleven and four; and the shareholders are requested to leave their respective shares and instalment receipts three days previously, for examination.

" By order of the directors,

" W. Smith Amies, Secretary."

1838.

BAILLIE v. KELL.

The above statement was entirely a fiction; and, in order to provide funds for the payment of the dividends, it was agreed that the payment of the salaries of the officers of the company (the plaintiff being a party assenting to this arrangement) should for a time be delayed. The dividends were paid.

In February, 1836, the plaintiff, with knowledge of its falsehood, entered into the company's books, by the desire of Pooley and Amies, a sum of 1080*l.* as having been received for sales of salt, which in fact was paid as deposits on shares.

Dr. Epps, who had throughout the business been kept in ignorance of the real nature of the concern, in the month of September, 1836, instituted an inquiry into the proceedings of Pooley, Amies, and the plaintiff; when it turned out that the whole affair was a fraud: and the plaintiff, on being charged with it, avowed his participation in the fraud, and sought to excuse it, as being a practice usually resorted to on the first formation of companies of the like description; and at a subsequent period he made known to the shareholders the course of conduct that had from the commencement been pursued.

Application having been made by the plaintiff in December, 1837, for 750*l.* arrears of salary which he claimed to be due to him, he was informed that the company (the shareholders having then taken the concern into their own hands) were of opinion that he ought to abandon all *claim* for salary, before they could take into consideration what remuneration should be made to him. The plaintiff sending no answer to this communication, the company resolved "that he had treated them with disrespect," and instructed their (new) secretary to inform him that they stood in no further need of his services. In consequence of this communication, the plaintiff, from the 3rd January, 1837, discontinued to attend at the company's offices. In Easter Term following he brought this

1838.

BAILLIE v. KELL.

action—by which he sought, under the first count, to recover damages for his dismissal pending the currency of the year, and, under the second count, three years' salary, at the rate of 400*l.* per annum, from the 1st September, 1834, minus a sum of 180*l.*, which he had received on account.

For the plaintiff, it was submitted that the evidence offered on behalf of the defendant, to shew fraud on the part of the plaintiff in the course of his service, did not support the sixth plea, the evidence applying only to one or two of several distinct charges, and these the least serious; and, with respect to the second count, that the alleged fraud could not be received as an answer to the plaintiff's claim upon a quantum meruit, it not being specially pleaded.

His lordship told the jury that the defendants were entitled to a verdict on the sixth plea, provided enough was proved to justify the plaintiff's dismissal; and that, if the plaintiff had been guilty of the fraud charged, and had by means of such fraud induced the defendants to continue him in the service of the company, that would afford an answer to the express contract, and would reduce the plaintiff's claim to the count on a quantum meruit, and then it would be for them to say whether the sum he had already received was a sufficient recompense to the plaintiff for the services he had rendered.

The jury returned a verdict for the defendants.

Butt, in Easter Term last, pursuant to leave, moved to enter a verdict for the plaintiff on the first count, or for a new trial—on the ground that the third and sixth pleas were not made out by the evidence; and that, there being no plea of fraud to the second count, the evidence of fraud or misconduct afforded no answer to the action as to that count.—It may be admitted, that, where the substance of a plea is proved, it is no objection that allegations that are

1838.

BAILLIE v. KELL.

mere matter of aggravation are not proved: but, where there are several allegations, each affording an answer to the action if pleaded alone, and all equally important and substantial, if the proof fails as to any one allegation that is material, the plea is not sustained—*Wood* v. *Budden*, Hobart, 119; *Spilsbury* v. *Micklethwaite*, 1 Taunt. 146; *Timothy* v. *Simpson*, 1 C. M. & R. 757; *Cousens* v. *Paddon*, 2 C. M. & R. 547; *Cohen* v. *Huskisson*, 2 M. & Welsby, 477. Here the substance of the plea was not proved. It charges, amongst other things, that the plaintiff was guilty of embezzlement; and there was no evidence whatever offered in support of that part of the plea. Suppose a stranger were to publish of the plaintiff that a jury had found him guilty of embezzlement, and the plaintiff brought his action for the libel, would not this finding support a justification? If pleaded as a judgment, it would be conclusive against the plaintiff in that action. With respect to the second count, which for this purpose must be taken as if it were the only count in the declaration, there was no plea to let in fraud as a defence to the action. Formerly, in the case of a bond, in order to avoid it on the ground of fraud, the fraud must be pleaded specially: the new rules of pleading have in this respect put specialties and simple contracts upon the same footing—*Potts* v. *Sparrow*, 1 New Cases, 594, 1 Scott, 578; *Martin* v. *Smith*, ante, p. 268, 4 New Cases, 410.

Talfourd, Serjeant, and *Hoggins*, shewed cause.—There was evidence enough of the fraudulent nature of the whole concern to warrant the jury in finding for the defendants upon the third plea. With respect to the sixth plea, all the material allegations were substantially proved. That plea alleges, that the plaintiff made up and rendered false, fraudulent, and fabricated accounts of payments &c.; that he also made false, fraudulent, and fictitious repre-

Sixth plea substantially proved.

1838.

BAILLIE v. KELL.

sentations to the defendants of divers matters and things pretended to have been done by him relating to the several businesses and transactions in which he was concerned as accountant; and that the accounts kept by him as such accountant, were so incorrectly, unskilfully, and improperly kept, that they were utterly useless and valueless to the defendants. All this was clearly proved. The only material allegation that was not supported by proof, was the allegation that the plaintiff had received money for which he had neglected to account. Enough, however, was proved to justify the plaintiff's dismissal. It was not necessary that each allegation should be exactly made out. The fact of the plaintiff having been convicted by his own acknowledgment of making false entries of receipts and payments, and false representations as to the situation and affairs of the company, for the avowed purpose of bolstering up a tottering fraud, fully warranted the defendants in discontinuing to receive his services. In *Spilsbury* v. *Micklethwaite*, 1 Taunt. 146, Sir James Mansfield thus lays down the rule: "If a plea of justification to an action of this nature consist of two facts, each of which would, when separately pleaded, amount to a good defence, it will sufficiently support the justification if one of these facts be found by the jury." The like was held in *Timothy* v. *Simpson*, 1 C. M. & R. 757, where Parke, B., in delivering the judgment of the court, says: "The replication puts in issue all the allegations constituting the ground of the arrest, and of these it is not necessary to prove *all*. It is enough to establish so many of them as would justify the arrest." So, in *Cohen* v. *Huskisson*, 1 M. & Welsby, 477, a material part of the plea was not supported; but the court held that the plaintiff was still entitled to the verdict, sufficient having been proved to afford a justification for the act of trespass complained of.

As to the second count.

As to the second count, the question is whether the defendants were entitled upon the present frame of the

1838.

BAILLIE v. KELL.

record to shew the worthlessness of the services for which the plaintiff seeks compensation. *Potts* v. *Sparrow* and *Martin* v. *Smith* have no application: they raise an entirely different question. There was a plea of payment; and it was admitted that 180*l.* had been paid to the plaintiff on account of salary: and this the jury very properly under the circumstances thought an ample remuneration for services such as those which he had rendered. It is contended on the part of the plaintiff that the special agreement is the only measure of remuneration, and that, in the absence of a plea, as applicable to the second count, that that agreement was induced by fraud, the jury were not warranted in taking into their consideration the improper conduct of the plaintiff. But the defendants were no parties to the special agreement; nor was there any evidence that they knew of its existence: and, even if they were bound by it, how could they know that the plaintiff would rely upon it in support of his claim on a quantum meruit? In *Allen* v. *Cameron*, 3 Tyr. 907, where A. for a valuable consideration contracted to sell and plant 70,000 trees on certain lands of the defendant, and to keep them in order for two years next after the planting thereof, and that such of them as should die during that period, except from injury by sheep, game, or cattle, should be replanted in the autumns of the two years by him; it was held that evidence of nonperformance by A. of any part of his contract, by which the trees had become of less value to the defendant, was admissible to reduce the damages in an action on the agreement for their price and for planting them. [*Tindal*, C. J.—*Chapel* v. *Hickes*, 2 C. & M. 214, seems very much in point: it was there held, that, in an action on a special contract for work done under the contract, and for work and labour and materials generally, the defendant may give in evidence that the work has been done improperly, and not agreeably to the contract; and the plaintiff in that case will only be entitled to reco-

1838.

BAILLIE v. KELL.

ver the real value of the work done and the materials supplied.]

Wilde, Serjeant, and *Butt*, in support of the rule.—Although the defendants were no parties to the original contract entered into by the company with the plaintiff, yet, when they became members, they became liable from that moment to all the engagements of the company. The third plea, which alleges that the defendants were induced to make the promise alleged in the first count, by the fraud, covin, and misrepresentation of the plaintiff, was not supported by the evidence. There was no evidence to shew either that the company was a fraud in its inception, or, if it were, that the plaintiff was party to or cognizant of the fraud. Down to the time of the issuing the circular in December, 1835, there is no suggestion of any fraud or deception having been practised by any one connected with the company.

Third plea.

As to the sixth plea—It is true, that, where the principal allegations in a plea are proved, and they of themselves afford a defence, the defence does not fail for the want of proof as to any immaterial allegations that are also found in the plea: but the plea must be proved in substance. This is all that is decided in *Spilsbury v. Micklethwaite*. Here, the plea contains several charges—that the plaintiff received money for which he did not account—that he made wrongful and improper payments—that he made false, fraudulent, and improper entries in the books and accounts, and rendered false, fraudulent, and fabricated accounts of pretended payments—that he made false, fraudulent, and fictitious representations of things done by him as accountant—that he refused to obey the just and reasonable commands of the defendants—that his accounts were so incorrectly, unskilfully, and improperly kept as to be utterly useless to the defendants—and that he was unfit and incompetent to perform the duties of an

Sixth plea.

1838.

BAILLIE v. KELL.

accountant. All that it can be pretended that the evidence applied to, were the allegations relating to the false entries and fictitious representations as to the condition of the company. These might subject him to a cross-action, but the value of his services stood wholly unaffected by them. [*Vaughan*, J.—The false entry as to the 1080*l.* alleged to have been received as the produce of salt sold by the company, but which in fact was received for shares, was of itself ample cause for the plaintiff's dismissal: the other distinct allegations in the plea, of other acts of misconduct, may be treated as surplusage.] The defendants aver that they dismissed the plaintiff from their service and employ by reason of *all* the alleged acts of misconduct. In Stephen on Pleading, 3rd edit. 262, it is said: "No matters, however multifarious, will operate to make a pleading double, that together constitute but one connected proposition or entire point. This qualification of the rule against duplicity, applies not only to pleadings in confession and avoidance, but to traverses also; so that a man may deny as well as affirm in pleading any number of circumstances that together form but a single point or proposition." In *Timothy* v. *Simpson*, 1 C. M. & R. 757, the plaintiff brought trespass for an assault and false imprisonment and taking him to a police-station. The defendant pleaded that he was possessed of a dwelling-house, and that the plaintiff entered the dwelling-house, and then and there insulted, abused, and ill-treated *the defendant and his servants* in the dwelling-house, and greatly disturbed them in the peaceable possession thereof, in breach of the peace; whereupon the defendant requested the plaintiff to cease his disturbance, and to depart from and out of the house; which the plaintiff refused to do, and continued in the the said house, making the said noise and affray therein; that thereupon the defendant, in order to preserve the peace and restore good order in the house, gave charge of the plaintiff to a certain policeman, and requested the policeman to take the plaintiff into his custody, to be dealt with

1858.

BAILLIE v. KELL.

according to law; and that the policeman, at such request of the defendant, gently laid his hands on the plaintiff for the cause aforesaid. The alleged assault on the defendant himself not having been proved—it was held that the plea was not substantially proved. That case, and *Cohen* v. *Huskisson*, 2 M. & Welsby, 477, which is to the same effect, are negative authorities in favour of the plaintiff. In *Phillips* v. *Howgate*, 5 B. & A. 220, where the first count of the declaration stated that the defendant assaulted and imprisoned the plaintiff, and, during such imprisonment, struck and ill-used him, and the defendant pleaded by way of justification, that he arrested the plaintiff under legal process, and that he, whilst in custody, having conducted himself in a violent manner, the defendant, to prevent his escape, struck him; it was held, that, the latter part of the justification not being proved, the plaintiff was entitled to judgment. So, in *Stanmers* v. *Yearsley*, 3 M. & Scott, 410, 10 Bing. 35, where the declaration charged an assault and battery of the plaintiff, and taking him in custody along certain streets, and imprisoning him on a false charge of an assault with intent to commit a felony; and the defendant pleaded that the plaintiff having assaulted him, he gave the plaintiff in charge of a peace officer, who took him before a magistrate—all the allegations in the count being proved, it was held that the plea was no sufficient answer. In *Bush* v. *Parker*, 4 M. & Scott, 588, 1 New Cases, 172, the declaration charged the defendants with having assaulted the plaintiff, seized and laid hold of him, pulled and dragged him about, struck him, and forced him from and out of a certain field into and through a pond, and imprisoned him; and a plea justifying all but the dragging the plaintiff through the pond, was held to be no answer to the action, the matter not covered by the plea being a distinct and substantive act of trespass. *Reece* v. *Taylor*, 4 N. & M. 469, is an authority to the same effect. *Wood* v. *Budden*, Hobart, 119, is also a strong authority for the

1838.

BAILLIE v. KELL.

plaintiff. Here all the allegations of the plea are put in issue by de injuriâ.—But, supposing enough shewn on the face of this plea to justify the plaintiff's discharge, the evidence clearly shewed that the plaintiff was not in fact discharged for any of the reasons therein alleged, but for what the company were pleased to call disrespectful conduct, in not answering certain communications which they had caused to be addressed to him. The plea therefore was disproved.

Then, as to the second count, even supposing the facts of the case to raise a presumption of fraud, there was no plea to that count to admit any such evidence. The only pleas were, non assumpsit, and payment; and under neither of these could fraud be shewn. *Allen* v. *Cameron* and *Chapel* v. *Hickes* do not apply; for, here, the plaintiff does not seek to recover upon the common count the same demand he goes for in the special count. Second count.

TINDAL, C. J.—This is an application for a new trial, on the ground that the verdict for the defendant as to certain of the issues, is against evidence. For the purpose of more conveniently considering the objections that have been urged on the part of the plaintiff, I will treat the two counts of the declaration as two distinct actions. In the first count the plaintiff complains of the breach of a special contract under which he was employed by the defendants as an accountant at the yearly salary of 400*l*., and he seeks to recover damages from the defendants for having improperly discharged him from such employment, without reasonable or probable cause. The two material pleas that are pleaded in answer to the charge are, the third and the sixth. The third plea states that the plaintiff caused and procured the defendants to promise as in the first count alleged, and the defendants were induced to make the promise, through and by means of the fraud, covin, and misrepresentation of the plaintiff and others in Third plea.

1838.

BAILLIE v. KELL.

collusion with him. The circumstances of the case are shortly these:—A pretended company was in September, 1834, established by four individuals, under certain terms agreed on between themselves. The defendant Kell became a shareholder in April, and the defendant Hegg, in July, 1835. It appears that the company was concocted and kept alive by the fraudulent contrivances of some of these persons, aided by the secretary of the company and by the present plaintiff, the accountant. But I am not prepared to say that there was any evidence to support the defendants' third plea: it did not appear that any fraud had been practised to induce them to become shareholders, or to retain the plaintiff in their service. I therefore think that the verdict on the third plea should be entered for the plaintiff.

Sixth plea.

With respect to the sixth plea, however, the case is different. That plea states, amongst other things, that the plaintiff did in the way of his service and employ as accountant receive money for which he did not duly account; that he made false, fraudulent, and improper entries in books and accounts of and belonging to the defendants, and made up and rendered false, fraudulent, and fabricated accounts of payments pretended to have been made, and false, fraudulent, and fictitious representations to the defendants of matters and things relating to the several businesses and transactions in which he was engaged as such accountant; and that all and every the accounts kept and things done by the plaintiff as such accountant, were so incorrectly, unskilfully, and improperly kept and done, that the same and every part thereof were utterly useless and of no value to the defendants. The objection to this plea is, that the whole of it was not proved, but one allegation only, viz. that the defendant had made false, fraudulent, and fictitious entries in the books and accounts of the company; and that the allegation in the plea, that, in consequence of the premises in that plea mentioned, the

defendants refused to permit the plaintiff any longer to continue in their employ, was not only not made out by the evidence, but, on the contrary, was expressly negatived.

It appears to me that the sixth plea contains three several allegations, either of which, being made out, would be sufficient to justify the dismissal of the plaintiff. Between these several allegations there is no necessary connection; nor are they at all qualified or varied in effect by those allegations as to which there was no proof. Two of these, viz. the concurrence in the fabricated circular addressed to the shareholders in December, 1835, and the false entry, in February, 1836, in the company's books, of a sum of 1080*l.* as received on account of sales of salt, when in fact the plaintiff well knew that it came from another source, were direct and distinct charges of grossly improper conduct; and both were established to the satisfaction of the jury. I am unable to distinguish the present case from that of *Spilsbury* v. *Micklethwaite*, 1 Taunt. 146. There, in an action for an assault, battery, and false imprisonment, the defendant pleaded, that, at a certain election for knights of the shire, at which the defendant presided as sheriff, the plaintiff threatened to assault him the defendant, *and then and there did actually assault him*, so being such sheriff, and then and there made a great noise and disturbance at the said election, and then and there obstructed and molested the defendant as such sheriff in the execution of his duty at such election: and the jury having found that the plaintiff did not assault the defendant, as alleged in the plea, but that all the other facts contained in the plea were proved; it was held, that, a substantive part of the plea having been proved, the defendant was entitled to a verdict. Sir James Mansfield there said: "If a plea of justification to an action of this nature consist of two facts, each of which would, when separately pleaded, amount to a good defence, it will sufficiently support the justification if one of those facts

1838.

BAILLIE v. KELL.

be found by the jury." I think the case is clearly distinguishable from *Timothy* v. *Simpson*, 1 C. M. & R. 757, and the other authorities cited on the part of the plaintiff. In *Timothy* v. *Simpson*, the plea contained but one ground of defence, and there was a failure of proof as to the main and substantial part of it, viz. the alleged assault on the defendant. The present case, however, ranges itself so closely within that of *Spilsbury* v. *Micklethwaite*, that I am utterly unable to distinguish the one from the other.

As to the cause alleged for the plaintiff's dismissal.

The next objection is, that the allegation at the end of the sixth plea, that the defendants discharged the plaintiff in consequence of his alleged misconduct, was not proved, but was distinctly contradicted by the evidence. I am not prepared to say, that, where a man discharges a servant, having good ground for so doing, he is precluded from shewing it, because he at the time gave a different reason. In *Crowther* v. *Ramsbottom*, 7 T. R. 654, it was held, that, in trespass for breaking and entering the plaintiff's close and taking his goods, the defendant might justify under a sufficient legal process if he had it in fact at the time, although he declared then that he entered for another cause. And Lord Kenyon said: "I never understood that a man was obliged to justify a distress for the cause which he happened to assign at the time it was made. If he can shew that he had a legal justification for what he did, that is sufficient. A man may distrain for rent, and avow for heriot service." The same principle is laid down in the case of *Dr. Grenville* v. *The College of Physicians*, 12 Mod. 386, where Holt, C. J., in delivering the opinion of the court, says: "Suppose one has a legal and an illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one; for, it is not what he declares, but the authority which he has, is his justification. I suppose the plaintiff means by this replication, that the defendant arrested him by virtue of some other authority, and not by the warrant that is

1838.

BAILLIE v. KELL.

pleaded; but then his way had been to induce his traverse by shewing that other authority, and then to traverse, not as here, absque hoc that it was by virtue of the warrant pleaded, but to say that the defendant arrested him by virtue of the other authority, absque hoc that he had the warrant pleaded at the time of the arrest: so, instead of traversing the virtute warranti, he should have pleaded the being of the warrant at that time. 34 Edw. 1. Fitz. '*Avowry*,' 332. 3 Co. 26. If one distrain for an unjustifiable cause, yet, when he comes to avow, he need not insist on the cause for which he had distrained, but may justify for any lawful cause, as, for rent arrear, though he distrained for some other cause; and the cause for which the distress in truth was, is not traversable, but riens in arriere is the proper plea."

But, without relying upon that as an answer, and looking exclusively to the facts proved in this case, I am of opinion that the jury were fully justified in concluding that the reason for which the plaintiff was discharged by the company was not that assigned, but was the discovery they had made of the plaintiff's irregular and improper conduct. It appeared, that, in September, 1836, an investigation first took place into the concerns of the company, and then the fraud was discovered; that a committee of shareholders was formed; and that, in the month of December, the whole matter was communicated to the rest of the shareholders. When thus made acquainted with the mode in which the affairs of the company had been managed, the minds of the shareholders must have been impressed with the conviction that the plaintiff was a very improper person to be continued in their employ. Although in the letter that was sent to the plaintiff, apprising him that the company had no further need of his services, they assigned as the reason for his dismissal that he had treated them with disrespect in not answering a previous communication, it does not appear that they ever consented

1838.

BAILLIE v. KELL.

was not the consequence of any of these acts of misconduct; but for another reason. That, however, was matter for the consideration of the jury. If it had appeared that the circumstances alleged in the plea had not then taken place, or that the defendants were ignorant of them at the time, there might be some weight in the objection. It might be that the defendants when they dismissed the plaintiffs from their service, from motives of kindness, refrained from assigning as the reason that which would have sent the plaintiff forth to the world with a stigma on his character. I cannot say that that is any ground for a new trial.—With respect to the count for work and labour—*Chapel* v. *Hickes* seems to me not to be distinguishable from the present case. The declaration contains a count upon a special contract, and a common count for work and labour. When the plaintiff was beaten upon the special contract, by evidence shewing that his whole conduct was a gross fraud, had not the jury a right, when he resorted to the quantum meruit, to consider what his services were reasonably worth? The whole was a question for them: and I think justice has been well administered in this case.

VAUGHAN, J.—I am of the same opinion. This is an application for a new trial on the ground that the verdict is against the evidence. I agree that this is to be considered as if there were two distinct actions—one upon the special contract—the other on a quantum meruit. The count upon the special contract is met by two pleas, viz. the third and the sixth. Upon the third plea the plaintiff is entitled to the verdict: there was no evidence that the concern was fraudulent in its inception; and the defendants, by coming into the company, adopt all contracts made by them. With respect to the sixth plea, the question is whether or not the several allegations of which it is composed are distinct and divisible; for, if they are, proof

Third plea.

Sixth plea.

1838.

BAILLIE v. KELL.

of any one of them that would afford a complete defence if it stood alone, will entitle the defendant to a verdict. If the argument on the part of the plaintiff were to prevail, it would be necessary in such a case as this to have a distinct plea for each charge of misconduct. It is admitted that the fact of the plaintiff having made false and fraudulent entries in the company's books afforded ground enough for his dismissal: but it is urged that that was not the ground assigned by the defendants at the time they discharged him. It appears to me, however, that, notwithstanding the reason they chose to assign for no longer requiring the plaintiff's services, it was still competent to the defendants to prove the true ground of dismissal. A man may distrain for one cause and avow for another—*Crowther* v. *Ramsbottom*.—As to the indebitatus count—the defendants had a right, under non assumpsit, to shew that the services had been so performed by the plaintiff as to be of little or no value to them; amd the jury were warranted in applying this in reduction of the damages. *Chapel* v. *Hickes* and *Allen* v. *Cameron* are authorities for this. The jury here seem to have considered that the plaintiff's services were worth no more than 180*l*.; and therefore the plea of payment was made out.

COLTMAN, J.—I agree that the plaintiff is entitled to the verdict upon the third plea: but, as to the sixth, it appears to me that the defendants are entitled. I take it to be a proposition undeniable in point of law, that, if the substance of a plea—so much as constitutes a complete answer to the action—be proved, it is enough. And I think the jury were well warranted in inferring that the false and fraudulent entries made by the plaintiff in the books of the company, induced the defendants to dimiss him from their service; and that they did not waive their right to discharge him on that ground, by assigning a different reason at the time.—Upon the second count a

1838.

BAILLIE v. KELL.

different question arises. Primâ facie the contract under which the plaintiff served the company was a contract under which he was to receive a salary of 400*l.* per annum: but that contract was subject to a condition that the plaintiff should properly perform the duty assigned to him. It is contended that upon this record the defence of fraud was not open to the defendants. I agree that fraud could not be set up as an answer to the action. And here it is not set up as an answer to the action: the defendants admit that the plaintiff was entitled to something; and the jury have found that 180*l.* was all his services were worth.

Rule discharged (18).

(18) The plaintiff had judgment on the 1st, 2nd, 3rd, 4th, 5th, and 7th issues, and the defendants on the 6th and 8th.

Friday, June 1st.

In assumpsit by the drawer against the acceptor of a bill of exchange, the defendant pleaded, that the acceptance was obtained from him by duress, *and* that he never had any value for the acceptance:—Held, had on special demurrer, on the ground of duplicity.

A plea containing two distinct defences is not the less a double plea, because one of the defences is badly pleaded.

STEVENS and Another *v.* UNDERWOOD.

TO a count in an action of assumpsit by the drawers against the acceptor of a bill of exchange, the defendant pleaded—that, before and at the time of making the said acceptance, he, the defendant, was unlawfully imprisoned by the plaintiffs and others in collusion with them, and then and there detained in prison until by the force and duress of the said imprisonment of him the said defendant, he made the said acceptance; and that he had never had any value for the said acceptance or for paying the said bill of exchange, or any part thereof, respectively—verification.

The declaration also contained a count upon an account stated. To this the defendant pleaded, that, before the stating of the account in that count mentioned, to wit, on &c., the plaintiffs made their bill of exchange in writing, and directed the same to the defendant, and thereby re-

1838.

STEVENS v. UNDERWOOD.

quired the defendant to pay to their order the sum of 46*l.* 6*s.* six months after the date thereof; that he, the defendant, accepted the said bill of exchange; that, before and at the time of making the said acceptance, he was unlawfully imprisoned by the plaintiffs and others in collusion with them, and then and there detained in prison until by the force and duress of the said imprisonment of him, the defendant, he made the said acceptance: and that he never had any value for the said acceptance or for paying the said bill of exchange, or for any part thereof, respectively; and that the said account stated in that count mentioned arose wholly upon the said bill of exchange, and the said acceptance thereof, and not otherwise—verification.

The plaintiff demurred specially to both pleas—assigning for causes, as to each—that the plea was double and multifarious, in this, to wit, that it contained two separate and distinct matters of defence, to wit, that the acceptance of the bill was unlawfully obtained by the plaintiffs from the defendant by duress of imprisonment, and that there never was any value or consideration for the said acceptance; that the plea was so pleaded that the plaintiffs could not take or offer any certain issue thereon; and that the plea was in other respects uncertain, informal, and insufficient.

Hoggins, in support of the demurrer, relied upon the alleged duplicity. The court called on—

Mansell, to support the pleas.—The pleas are not double. The fact of the acceptance having been obtained by duress, would not render the bill void ab initio, or afford an answer to an action at the suit of an innocent indorsee for value—2 Inst. 482; Com. Dig. *Pleader*, (2 W. 19). [*Tindal*, C. J.—It is a good answer to the action when brought by the party himself.] At all events, the second branch of the

1838.

BAILLIE v. KELL.

collusion with him. The circumstances of the case are shortly these:—A pretended company was in September, 1834, established by four individuals, under certain terms agreed on between themselves. The defendant Kell became a shareholder in April, and the defendant Hogg, in July, 1835. It appears that the company was concocted and kept alive by the fraudulent contrivances of some of these persons, aided by the secretary of the company and by the present plaintiff, the accountant. But I am not prepared to say that there was any evidence to support the defendants' third plea: it did not appear that any fraud had been practised to induce them to become shareholders, or to retain the plaintiff in their service. I therefore think that the verdict on the third plea should be entered for the plaintiff.

Sixth plea.

With respect to the sixth plea, however, the case is different. That plea states, amongst other things, that the plaintiff did in the way of his service and employ as accountant receive money for which he did not duly account; that he made false, fraudulent, and improper entries in books and accounts of and belonging to the defendants, and made up and rendered false, fraudulent, and fabricated accounts of payments pretended to have been made, and false, fraudulent, and fictitious representations to the defendants of matters and things relating to the several businesses and transactions in which he was engaged as such accountant; and that all and every the accounts kept and things done by the plaintiff as such accountant, were so incorrectly, unskilfully, and improperly kept and done, that the same and every part thereof were utterly useless and of no value to the defendants. The objection to this plea is, that the whole of it was not proved, but one allegation only, viz. that the defendant had made false, fraudulent, and fictitious entries in the books and accounts of the company; and that the allegation in the plea, that, in consequence of the premises in that plea mentioned, the

defendants refused to permit the plaintiff any longer to continue in their employ, was not only not made out by the evidence, but, on the contrary, was expressly negatived.

1838.

BAILLIE v. KELL.

It appears to me that the sixth plea contains three several allegations, either of which, being made out, would be sufficient to justify the dismissal of the plaintiff. Between these several allegations there is no necessary connection; nor are they at all qualified or varied in effect by those allegations as to which there was no proof. Two of these, viz. the concurrence in the fabricated circular addressed to the shareholders in December, 1835, and the false entry, in February, 1836, in the company's books, of a sum of 1080*l.* as received on account of sales of salt, when in fact the plaintiff well knew that it came from another source, were direct and distinct charges of grossly improper conduct; and both were established to the satisfaction of the jury. I am unable to distinguish the present case from that of *Spilsbury* v. *Micklethwaite*, 1 Taunt. 146. There, in an action for an assault, battery, and false imprisonment, the defendant pleaded, that, at a certain election for knights of the shire, at which the defendant presided as sheriff, the plaintiff threatened to assault him the defendant, *and then and there did actually assault him*, so being such sheriff, and then and there made a great noise and disturbance at the said election, and then and there obstructed and molested the defendant as such sheriff in the execution of his duty at such election: and the jury having found that the plaintiff did not assault the defendant, as alleged in the plea, but that all the other facts contained in the plea were proved; it was held, that, a substantive part of the plea having been proved, the defendant was entitled to a verdict. Sir James Mansfield there said: "If a plea of justification to an action of this nature consist of two facts, each of which would, when separately pleaded, amount to a good defence, it will sufficiently support the justification if one of those facts

1838.

STEVENS v. UNDERWOOD.

Dig., *Pleader* (E. 2). Thus, a plea is said to be bad for duplicity, where several matters are pleaded together, "though one be in bar, and the other in abatement;" again, "though one matter or the other be not well pleaded; as, in trespass, if the defendant pleads molliter manus imposuit and a release, it is double, though the release is not well pleaded"—for both which Comyns cites 1 Sid. 176. It is also said by Dodderidge, J., in Popham, 186, that a plea containing two several defences, is bad for duplicity, "though but one of the several matters pleaded be material." So, here, I am of opinion that, although the second ground of defence alleged in each of these pleas may be bad on demurrer, still the pleas are obnoxious to the charge of duplicity; and therefore that the plaintiff is entitled to judgment. If, however, the defendant be willing to amend by striking out the second branch of the plea, paying the costs within three days, and undertaking to accept short notice of trial, I think he ought to be allowed to do so: he should not be precluded by a technical rule from availing himself of a fair defence.

The rest of the court concurring—

Rule accordingly.

Thursday, May 31st.

VERBECKE *v.* PEARSE.

IN declaring on a deed, the plaintiff excused profert, on the ground that the only copy of the deed in existence, was in the hands of the defendant's attorney. The defendant demurred to the declaration, assigning for cause the insufficiency of this excuse: but, there being no point marked for argument—

Special demurrers are within the rule of Hilary Term, 4 Will. 4, s. 2, which requires the point to be marked in the margin: but, in such case the rule will be complied with by a statement that the points intended to be argued are those stated in the demurrer itself.

1838.

VERBECKE v. PEARSE.

Corrie, on a former day, obtained a rule nisi to set aside the demurrer, and for leave to sign judgment as for want of a plea.

Wightman, contrà.—The demurrer being special, he submitted that the points to be argued sufficiently appeared, or that, at all events, the defendant should be allowed to amend by adding the points, on the usual terms.

Corrie in support of his rule, referred to the general rule of Hilary term, 4 Will. 4, s. 2, by which it is provided, that, "in the margin of *every* demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated, and if *any* demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the court or a judge, and leave may be given to sign judgment as for want of a plea;" and to *Lindus* v. *Pound*, 2 M. & Welsby, 240, where it was held, that, if a *special* demurrer be delivered without a marginal note of the matter intended to be argued, the court will set it aside.

THE COURT were inclined to permit the defendant to amend, by delivering the points: but, it appearing that no office copies of the affidavit upon which the rule was moved had been taken, they observed that the defendant was not in a situation to shew cause against the rule. Ultimately, however, the rule was discharged, the defendant paying costs, and undertaking to plead issuably and to accept short notice of trial.

Rule accordingly (21).

(21) See Grottick v. Phillips, 3 M. & Scott, 135; Bayley v. Homan, 3 Scott, 384.

1838.

Thursday, June 1st.

BARCLAY and Others *v.* JOHN COLLETT.

The testator devised and bequeathed to several sons and daughters realty and personalty as described in certain schedules annexed to his will, with survivorships and trusts of a very complicated description. A freehold house in Southwark of which the testator was seised at the time of making his will and at the time of his decease, he omitted specifically to dispose of; but by a codicil attested by one witness only he declared his intention to be that that house should go to his eldest son. The will contained the following residuary clause—"all the rest, residue, and remainder of my real and personal estate and effects whatsoever and wheresoever, I give, devise, and bequeath unto my said trustees, their heirs &c., in trust to divide the same equally amongst my children when my youngest son shall attain the age of twenty-five years, so and in such manner that the shares of each of my children of and in the said residue may be held and enjoyed upon the same trusts, and be subject to the same contingencies and bequests over, as their respective original legacies are subject and liable to under and by virtue of this my will:"—Held, that the freehold in Southwark passed to the trustees under the residuary clause, notwithstanding the difficulty of dealing with it according to the trusts referred to.

THIS was an action of trover to recover certain title deeds and writings (22).

(22) The following is the schedule of deeds &c. sought to be recovered:—

"Nov. 14 and 15, 1746.—Indenture between The Rt. Hon. Sarah, Countess Dowager of Suffolk, of the first part, William Hammond, Esq., of the second part, Edward Dawson, Esq., of the third part, and William Underwood, Apothecary, of the fourth part.

"Same date—Michaelmas Term, 20 Geo. 2.—Indenture of fine, between William Hammond, Esq., plaintiff, and Sarah, Countess Dowager of Suffolk, deforciant.

"Nov. 15, 1746.—Indenture of bargain and sale, inrolled in Chancery, between the said Countess of Suffolk of the first part, and the said William Hammond of the other part.

"Aug. 3, 1796.—Attested copy indenture between The Rt. Hon. Henry Addington and Ursula Mary his wife of the first part, Mary Ann Hammond of the second part, James Adams, Esq., of the third part, and Joseph White of the fourth part.

"April 21, 1806.—Copy will of Richard Allen.

"July 3 and 4, 1800.—Indentures of lease and release—the indenture of release made between The Rt. Hon. Henry Addington and Ursula Mary his wife of the first part, Joseph Adams, Esq., of the second part, Richard Allen, Esq., of the third part.

"Oct. 28 and 29, 1806.—Indentures of lease and release made between the said Joseph Allen and Thomas Carter of the first part, Mary Allen, widow, of the second part, Joseph Allen, gent., of the third part, Ebenezer John Collett, Esq., of the fourth part, and Thomas Massa Alsager, Esq., of the fifth part.

"June 24, 1807.—Contract under the hands and seals of commis-

The defendant pleaded—1st, not guilty—secondly, that the plaintiffs were not possessed of the said deeds &c. as of their own property, as alleged in the declaration—thirdly, that the said deeds &c. were the property of the plaintiffs and defendant as tenants in common. On each of these pleas issue was joined.

The cause came on for trial before Tindal, C. J., at the Surry Spring Assizes, 1837, when a verdict was found for the plaintiffs, damages 5,000*l.*, to be reduced to 1*s.* upon the deeds &c. being delivered up to the plaintiffs by the defendant, in the event of the court being of opinion that the plaintiffs were entitled to judgment on the following case:—

Ebenezer John Collett, in the year 1806, and many years previous thereto, carried on the trade or business of a hop-merchant in the borough of Southwark, in the county of Surrey. In that year he became seised in fee by purchase of the messuage and premises to which the deeds and writings mentioned in the declaration relate. The premises were used by the said Ebenezer John Collett for carrying on the business of a hop-merchant; and he continued to use them for that purpose from the time of his becoming so seised until the year 1821, when he retired from trade, and was succeeded therein by the defendant, his eldest son and heir at law. On the defendant succeeding to the business of the said Ebenezer John Collett, he became tenant from year to year to the said Ebenezer John Collett, of the said premises, at the rent of 100*l.* per annum: but he ceased to pay any rent from March, 1828, the said Ebenezer John Collett having in-

sioners for the redeption of the land-tax, for the redemption thereof, and certificate indorsed of transfer of stock.

"An inventory of fixtures.

"Sept. 1, 1806.—A letter from Mr. Wilson to the testator.

"Dec. 4, 1815.—A letter from Mr. Thomas Allen to the testator.

"A statement of purchase-money to be paid by the testator."

1836.

BARCLAY v. COLLETT.

formed him about that time that he was thenceforth not to pay rent for the same, and the said Ebenezer John Collett not having in fact subsequently required the defendant to pay rent for the same.

Will of E. J. Collett.

On the 11th October, 1827, during the continuance of the defendant's occupation of the premises as tenant, and whilst he paid rent to the said Ebenezer John Collett as such tenant from year to year, the said Ebenezer John Collett made his last will and testament, and thereby nominated and appointed John Tritton (who died in the lifetime of the testator) and the plaintiffs Abram Rawlinson Barclay, Thomas Massa Alsager, and Henry Lloyd, trustees and executors of his will. The testator, after directing that all his just debts, funeral and testamentary expenses, should be first paid by his executors out of the personal estate, gave, devised, and bequeathed the freehold and copyhold hereditaments, and the 3 per cent. reduced annuities mentioned and specified in the first schedule thereunder written, unto and to the use of John Tritton, Abram Rawlinson Barclay, Thomas Massa Alsager, and Henry Lloyd, their heirs, executors, administrators, and assigns, according to the nature and quality thereof—In trust to pay to or otherwise permit and suffer his daughter Mary Sandars (wife of Samuel Sandars, of Boston, in the county of Lincoln, merchant,) to receive and take the rents, dividends, and annual income of the said premises, or to occupy the said freehold and copyhold hereditaments, for her own sole and separate use, during her natural life, without impeachment of waste (except as to ornamental timber or other trees); but so that she might not charge, sell, or anticipate the same: and the testator declared that her receipts alone (notwithstanding her present or any future coverture) should be good discharges to his said trustees for the said rents, dividends, and annual income: And, after the decease of the said Mary Sandars—upon trust to convey, surrender,

Devise to trustees,

in trust for testator's daughter Mary Sandars.

and assure the said freehold and copyhold hereditaments unto and to the use of the eldest or only son of his said daughter Mary Sandars who should be living at her decease, or who should have departed this life in her lifetime leaving lawful issue living at her death, and to his heirs and assigns absolutely for ever: But if, at the time of the death of the said Mary Sandars, there should be no such eldest or only son or issue of an eldest or only son then living—upon trust to convey, surrender, and assure the said freehold and copyhold hereditaments unto and to the use of the person or persons who at the time of the death of the said Mary Sandars should be her heir or heirs at law, and to his, her, and their heirs and assigns for ever; and upon trust to pay, assign, and divide the said 3 per cent. reduced annuities unto, between, and amongst all and every the child and children of the said Mary Sandars who should be living at her decease, or, being a son or sons, should have departed this life in her lifetime leaving lawful issue living at her death, or, being a daughter or daughters, should have been married, in equal parts, shares, and proportions, if more than one, and to his, her, and their respective executors, administrators, and assigns, to be paid and transferred to such of the same children as should be under age at the time of the decease of his said daughter, when and as they respectively should attain the age of twenty-one years as to sons, or that age or day of marriage as to daughters.

Devise to testator's eldest son, John Collett, the defendant.

The testator gave and bequeathed the freehold, leasehold, and copyhold hereditaments, and the 3 per cent. reduced annuities mentioned and specified in the second schedule thereunder written unto and to the use of his son John Collett, the defendant, his heirs, executors, administrators, and assigns, absolutely, for ever, according to the nature and quality thereof; the said reduced 3 per cent. annuities to be transferred to him within six months next after the testator's decease, with all dividends then due in respect of the same.

1838.

BARCLAY v. COLLETT.

Devise to testator's second son, Thomas Collett.

The testator gave and devised the freehold and copyhold hereditaments mentioned and specified in the third schedule thereunder written, unto and to the use of his son Thomas Collett, his heirs and assigns for ever, according to the nature and quality thereof.

Bequest to trustees,

The testator gave and bequeathed the 3 per cent. reduced annuities mentioned or referred to in the third schedule thereunder written, unto the trustees before named, their executors, administrators, and assigns, upon

in trust for Thomas Collett on his attaining the age of twenty-five.

trust to pay or assign the same unto his said son Thomas Collett, his executors, administrators, or assigns, upon his attaining the age of twenty-five years, with all dividends and savings accumulated from the day of his the said testator's death up to that time: but, in case his said son Thomas Collett should happen to depart this life before he should attain the age of twenty-five years, leaving lawful issue living at his death, then upon trust to pay, apply, assign, and divide the said lastly-mentioned 3 per cent. reduced annuities unto, between, and amongst all and every the child and children of his said son Thomas Collett, his, her, and their executors, administrators, and assigns, in equal parts, shares, and proportions, if there should be more than one, to be vested interests in them at the age of twenty-one years or death under that age leaving lawful issue living at his or their death or respective deaths as to sons, or that age or day of marriage as to daughters; and in case any or either of the same children, being a son, should happen to die under the age of twenty-one years without leaving lawful issue living at his death, or, being a daughter, should die under that age without having been married, then, as to the original or accruing shares of the child or children so dying—in trust to divide the same between the other or others of the same children in like manner as thereinbefore directed of his, her, or their original share or shares: and, in case his said son Thomas Collett should depart this life under the age

1838.

BARCLAY v. COLLETT.

of twenty-five years without leaving lawful issue living at his death, then in trust to pay, assign, and divide the said lastly-mentioned 3 per cent. reduced annuities unto, between, and amongst his brothers and sisters, in equal parts, shares, and proportions, in such way and manner and subject to such trusts as he, the said testator, had by that his will given and bequeathed their respective legacies in the said 3per cent. reduced annuities.

Devise to testator's third son, W. R. Collett.

And the testator gave and devised the freehold and copyhold hereditaments mentioned and specified in the fourth schedule thereunder written, unto and to the use of his son William Rickford Collett, his heirs and assigns absolutely, for ever, according to the nature and quality thereof, provided he lived to attain the age of twenty-five years, or departed this life before he attained that age leaving lawful issue living at his death: But, if his said son William Rickford Collett should depart this life before he attained the age of twenty-five years, without leaving lawful issue living at his death, then the testator gave and devised the said lastly-mentioned hereditaments unto his son Benjamin Collett, his heirs and assigns absolutely, for ever.

Bequest to trustees,

And the said testator gave and bequeathed the 3 per cent. reduced annuities mentioned or referred to in the fourth schedule thereunder written, unto the trustees before named, their executors, administrators, and assigns, upon trust to pay or assign the same unto the said William Rickford Collett, his executors, administrators, or assigns, upon his attaining the age of twenty-five years, with all dividends and savings accumulated thereon from the day of his death up to that time: But, in case his said son William Rickford Collett should depart this life before he attained the age of twenty-five years, leaving lawful issue living at his death, then—upon trust to pay, assign, and divide the said lastly-mentioned 3 per cent. reduced annuities unto, between, and amongst all and every the

in trust for W. R. Collett on his attaining the age of twenty-five.

1838.

BARCLAY v. COLLETT.

children of his said son William Rickford Collett, his, her, and their executors, administrators and assigns, in equal parts, shares, and proportions, if there should be more than one, to be vested interests in them at the age of twenty-one years or death under that age having lawful issue living at his or their death or respective deaths as to sons, or at that age or day of marriage as to daughters; and, in case any or either of the same children, being a son, should happen to die under the age of twenty-one years without leaving lawful issue living at his death, or, being a daughter, should die under that age without having been married, then, as to the original and accruing shares of the said lastly-mentioned child or children so dying, in trust to pay and divide the same unto, between, and amongst the other or others of the same children, in like manner as thereinbefore directed of his, her, and their original share or shares: But, in case his said son William Rickford Collett should depart this life under the age of twenty-five years, without leaving lawful issue living at his death, then the said testator thereby directed that the said lastly-mentioned sum of 3 per cent. reduced annuities should sink into and form part of the residue of his personal estate, and be applied therewith, as thereinafter directed.

Bequest to trustees,

in trust for testators's son Benjamin Collett, on his attaining the age of twenty-five.

The testator gave and bequeathed the 3 per cent. reduced annuities mentioned or referred to in the fifth schedule thereunder written, unto the said trustees before named, their executors, administrators, and assigns, upon trust to pay or assign the same unto his son Benjamin Collett, his executors, administrators, and assigns, upon his attaining the age of twenty-five years, with all accumulations thereon from the day of his death up to that time: But, in case his said son Benjamin Collett should depart this life before he attained the age of twenty-five years, leaving lawful issue living at his death—then upon trust to pay, assign, and divide the said lastly mentioned 3 per cent. annuities unto, between, and amongst all and every

the child or children of his said son Benjamin Collett, his, her, or their executors, administrators, and assigns, in equal parts, shares, and proportions, if there should be more than one, to be vested interests in them at the age of twenty-one years or death under that age leaving lawful issue living at his or their death or deaths as to sons, or that age or day of marriage as to daughters; and, in case any or either of the same children, being a son, should happen to die under the age of twenty-one years without leaving lawful issue living at his death, or, being a daughter, should die under that age without having been married, then, as to the original and accruing shares of the child or children so dying—in trust to pay and divide the same unto, between, and amongst the other or others of the same children, in like manner as thereinbefore directed of his, her, and their original share and shares: But, in case his said son Benjamin Collett should depart this life under the age of twenty-five years without leaving lawful issue living at his death, then he willed and directed that the said lastly mentioned sum of 3 per cent. reduced annuities should sink into and form part of the residue of his personal estate, and be applied therewith as thereinafter directed.

Bequest to trustees,

The testator gave and bequeathed the 3 per cent. reduced annuities mentioned and referred to in the sixth schedule thereunder written, unto the trustees before named, their executors, administrators, or assigns—upon trust to pay to or otherwise permit and suffer his daughter Margaret Collett to receive and take the dividends, interest, and annual income thereof for her own sole and separate use and benefit during the term of her natural life, so that the same might not be subject or liable to the debts, control or engagements of any husband with whom she might intermarry, and so that she might not sell, charge, or anticipate the said dividends, interest, and annual income; and he declared her receipts alone (not-

in trust for testator's daughter Margaret Collett.

1838.

BARCLAY v. COLLETT.

withstanding her coverture) to be the only proper discharges to his trustees for the said interest, dividends, and annual income; and, after the decease of his said daughter Margaret—upon trust to pay, assign, and divide the said lastly mentioned 3 per cent. reduced annuities unto, between, and amongst all and every the child and children of his daughter Margaret Collett, his, her, and their executors, administrators, and assigns, in equal parts, shares, and proportions, if there should be more than one, to be vested interests in them at the age of twenty-one years or death under that age leaving lawful issue living at his or their death or respective deaths as to sons, or that age or day of marriage as to daughters; and, in case any or either of the same children, being a son, should happen to die under the age of twenty-one years without leaving lawful issue living at his death, or, being a daughter, should die under that age without having been married, then, as to the original and accruing shares of the same child or children so dying—in trust to pay and divide the same unto, between, and amongst the other or others of the same children, in like manner as therein before directed of his, her, and their original share or shares: But, in case his said daughter Margaret Collett should depart this life without leaving any issue living at her death, or, leaving such, they should all depart this life under the age of twenty-one years, without leaving lawful issue living at his or their death or respective deaths as to sons, or under that age without having been married as to daughters—then he willed and directed that the said lastly mentioned sum of 3 per cent. reduced annuities should sink into and form part of the residue of his personal estate, and be applied therewith, as thereinafter directed.

Bequest to trustees,

And the testator gave and bequeathed the 3 per cent. reduced annuities mentioned or referred to in the seventh schedule thereunder written unto the said trustees, their executors, administrators, and assigns—upon trust to pay

in trust for tes-

1838.

BARCLAY v. COLLETT.

tator's daughter Sarah Ormerod.

to or otherwise permit and suffer his daughter Sarah Ormerod, now the wife of Charles Ormerod, Esq., to receive and take the dividends, interest, and annual income thereof for her own sole and separate use and benefit during the term of her natural life, so that the same might not be subject or liable to the debts, control, or engagements of her present or any future husband with whom she might intermarry, and so that she might not sell, charge, or anticipate the same; and the testator declared that her receipts alone (notwithstanding her then present or any future coverture) should be the only proper discharges to his said trustees for the said dividends, interest, and annual income: and after the decease of his said daughter Sarah Ormerod—upon trust to pay, assign, and divide the said lastly mentioned 3 per cent. reduced annuities unto, between, and amongst all and every the child and children of his said daughter Sarah Ormerod, his, her, and their executors, administrators, and assigns, in equal parts, shares, and proportions, if there should be more than one, to be vested interests in them at the age of twenty-one years or death under that age leaving lawful issue living at his or their death or respective deaths as to sons, or that age or day of marriage as to daughters; and, in case any or either of the same children, being a son, should happen to die under the age of twenty-one years, without leaving lawful issue living at his death, or, being a daughter, should die under that age without having been married, then, as to the original or accruing shares of the child or children so dying—in trust to pay and divide the same unto, between, and amongst the other or others of the same children, in like manner as thereinbefore directed of his, her, or their original share or shares: But, in case his said daughter Sarah Ormerod should depart this life without leaving any issue living at her death, or, leaving such, they should all depart this life under the age of twenty-one years, without leaving lawful issue living at his or

1838.

BARCLAY v. COLLETT.

their deaths as to sons, or under that age without having been married as to daughters—then he willed and declared that the said last-mentioned sum of 3 per cent. reduced annuities should sink into and form part of the residue of his personal estate, and be applied therewith as thereinafter mentioned.

Bequest to trustees.

And the testator, gave and bequeathed the 3 per cent. reduced annuities mentioned or referred to in the eighth schedule thereunder written, unto the said trustees, their executors, administrators, and assigns—upon trust to pay to or otherwise permit and suffer his daughter Elizabeth Collett to receive and take the dividends, interest, and annual income thereof for her sole and separate use and benefit during the term of her natural life, so that the same might not be subject or liable to the debts, control, or engagements of any husband with whom she might intermarry, and so that she might not sell, charge, or anticipate the same; and he declared that her receipts alone (notwithstanding her coverture) should be the only proper discharges to his trustees for the same dividends, interest, and annual income: And, after the decease of his said daughter Elizabeth Collett—upon trust to pay, assign, and divide the said lastly mentioned 3 per cent. reduced annuities unto, between, and amongst all and every the child and children of his said daughter Elizabeth Collett, his, her, and their executors, administrators, and assigns, in equal parts, shares, and proportions, if there should be more than one, to be vested interests in them at the age of twenty-one years or death under that age leaving lawful issue living at his or their death or respective deaths as to sons, or that age or day of marriage as to daughters; and, in case any or either of the same children, being a son, should happen to die under the age of twenty-one years without leaving lawful issue living at his death, or, being a daughter, should die under that age without having been married—then, as to the original and accruing shares

in trust for testator's daughter Elizabeth Collett.

1838.

BARCLAY v. COLLETT

of the same child or children so dying—in trust to pay and divide the same unto, between, and amongst the other or others of the same children, in like manner as thereinbefore directed of his, her, or their original share and shares: But, in case his said daughter Elizabeth Collett should depart this life without leaving any issue living at her death, or, leaving such, they should all depart this life under the age of twenty-one years without leaving lawful issue living at his or their death as to sons, or under that age without having been married as to daughters—then he willed and directed that the said lastly mentioned sum of 3 per cent. reduced annuities should sink into and form part of the residue of his personal estate, and be applied therewith as thereinafter mentioned.

Further bequest in trust for Mary Sandars.

The testator, by his said will, after providing for the maintenance and advancement of his children during minority, giving directions as to the investment of monies in the hands of his trustees, and for making their receipts sufficient discharges, and after devising his trust estates—gave and bequeathed all his household goods, plate, linen, and china, and all other his furniture, books, pictures, wines, spirits, and all his farming stock and implements of husbandry, horses, cows, cattle, sheep, carts, carriages, and personal chattels in and about the house and premises which he might occupy at the time of his decease, unto his said trustees—in trust for his said daughter Mary Sandars, her executors, administrators, and assigns, for her own use and benefit, so that the same, or the produce thereof, might not be in any manner subject or liable to the debts, control, or engagements of her then present or any future husband with whom she might intermarry, and so that her receipts alone (notwithstanding her coverture) might be good discharges for the same, or the produce thereof.

The will then contained a devise or bequest as follows:—

1838.

BARCLAY v. COLLETT.

Residuary clause.

"All the rest, residue, and remainder of my real and personal estate and effects whatsoever and wheresoever, I give, devise, and bequeath unto my said trustees, their heirs, executors, administrators, and assigns—in trust to divide the same equally among my children when my youngest child shall attain the age of twenty-five years, so and in such manner that the shares of each of my children of and in the said residue may be held and enjoyed upon the same trusts, and be subject to the same contingencies and bequests over as their respective original legacies are subject and liable to under and by virtue of this my will." And immediately following is a proviso in these terms: "Provided, that, if any of my children shall die before my youngest child attains the age of twenty-five years, without leaving any lawful issue living at his or their death, or, leaving such, all such issue shall be extinct at the time my said youngest child shall attain the age of twenty-five years—then I will and declare that the share or shares of my said child or children so dying of and in the residue of my said real and personal estate and effects, shall accrue to and be divided amongst such of my children as shall be living at the time my youngest child attains the age of twenty-five years, or shall have departed this life before that time leaving lawful issue then living, such accruing shares to be held and enjoyed upon the same trusts, ends, intents, and purposes as thereinbefore declared of and concerning the original shares of my said children of and in the said residue."

The will further contained a proviso for the appointment of new trustees, for the reimbursement of trustees, and a revocation of former wills; and concluded thus:—"In witness whereof I have hereunto set my hand and seal, to wit, my hand to the fifteen preceding sheets, and my hand and seal to this sixteenth and last sheet thereof, the day and year first written."

Schedules.

The schedules referred to in the will were eight in

1838.

BARCLAY v. COLLETT.

number. The second, specifically referred to in this case, containing a description of the property devised to the defendant, was as follows:—"All that piece or parcel of land called Hammersfield, containing by estimation twenty-five acres, and which is composed of several pieces of land, heretofore Great Seats, Little Seats, Feazes, Three Hedges, and White Hill, the former whereof have been heretofore grubbed up, situate in the parish of Hemel Hempstead, in the county of Herts; and all that allotment of freehold land in the parish of Morden, in the county of Cambridge, containing half an acre; and also the Malthouse, and all those several small messuages or tenements, lands, and hereditaments, in the same parish of Morden, being copyhold, and of several different manors, or leasehold held of St. John's College, Cambridge; and also the sum of 30,000*l.* 3 per cent reduced annuities." Second schedule.

At the conclusion of all the schedules, the will was signed "E. Jno. Collett," and sealed: and there was an attestation, signed by three witnesses, in these words:—"The foregoing writing, with the eight several schedules thereto, contained in sixteen sheets of paper, were signed, sealed, published, and declared by the said Ebenezer John Collett, the testator, as and for his last will and testament, in the presence of us who in his presence and in the presence of each other have subscribed our names as witnesses thereto."

Upon the last sheet of the will there was a codicil or testamentary memorandum, bearing date the 13th February, 1828, signed by the testator, and attested by one witness only, in the following words:—"13th February, 1828. Memorandum. Having omitted to include my freehold house and premises in the borough of Southwark in the second schedule of my above will, as I intended, I declare my will and desire to be that the same should be considered as included therein and pass to my said son John Collett, who, being my heir-at-law, will be entitled to the same by descent from me at my decease." Codicil.

1838.

BARCLAY v. COLLETT.

Death of testator; and state of the family.

The said Ebenezer John Collett died on or about the 31st October, 1833. Mary Sandars, the daughter of the testator, is living. She has several children also living, that is to say, Margaret, Mary, Thomas Collett, Ellen, Elizabeth, Adelaide, Richard, Edmund, and Catherine, all of whom are under age. The testator's daughter Margaret Collett intermarried, in the lifetime of the testator, with John David Hay Hill, Esq. The said Margaret Hill is living; and there are issue of that marriage living the following children, that is to say, John David Hay, Margaret Julia Hay, Henrietta Hay, and Margaret Harriet Hay, all of whom are under age. The testator's daughter Sarah Ormerod is living. She also has several children living, that is to say, Margaret Catherine, Charles Wilden Arthur, and Herbert Elliott, all of whom are under age. Thomas Collett, the son, attained his age of twenty-five years in the lifetime of the testator. The youngest child of the testator attained the age of twenty-five years in July, 1837.

The will was never in any way altered or revoked by the testator, except so far as the said codicil may be deemed to operate as an alteration or revocation thereof.

Proof of will.

The will was on the 20th of November, 1833, duly proved by the plaintiffs in the Prerogative Court of Canterbury, to whom probate has been regularly granted.

Defendant possessed of the deeds &c.

The defendant, before and at the time of the commencement of this suit was in possession of the deeds and writings in the schedule, and for the recovery of which this action is brought; and the same were before the commencement of this suit demanded by the plaintiffs, and refused by the defendant to be delivered up by him to them, and are now in his possession and retained by him.

Demand and refusal.

Personal estate sufficient to pay debts and legacies.

The personal estate of which the testator died possessed was sufficient to discharge all debts and demands due from him, and to pay the specific legacies.

1838.

BARCLAY v. COLLETT.

The testator had no freehold property which was not specifically and in terms described in and devised by the schedules to his will, or some one of them, except the premises in question.

Premises in question the only freehold not specifically devised.

The question for the opinion of the court was—

Question.

Whether the plaintiffs had shewn a sufficient property in the deeds to entitle them to recover in this action against the defendant. If the court should be of opinion that the plaintiffs had shewn a sufficient property in the deeds, then the verdict already entered was to stand. If the court should be of a contrary opinion, then the verdict was to be entered for the defendant. Either party was to be at liberty, with the sanction of the court to turn the special case into a special verdict (22).

(22) The points marked for argument were as follow:—

For the plaintiffs—That they were entitled to the premises by virtue of the residuary clause contained in the will, which they alleged passed to and vested the same in them; and that, being so entitled, they had established a right of property in the deeds which, they having been demanded of the defendant, and the delivery thereof refused by him, entitled them to recover in this action.

For the defendant—First, that, by reference to the will, it did not sufficiently appear that it was the intention of the testator to include the premises in question in the residuary clause, to defeat the title of the defendant as heir at law; that, by reference as well to the will as to the facts found in the case, a contrary intention was manifest; and that the house in question did not pass to the plaintiffs by the residuary clause:

Secondly—that, if the residuary clause could be held to extend to the house, then the devise was void for uncertainty as to which limitation the devise over was to follow, in the case of the four children taking both realty and personalty:

Thirdly—that, if the devise was not wholly void, the declared trusts, so far as they related to real property, were void for uncertainty, in which case a trust resulted in favour of the defendant as heir at law; and the plaintiffs, being trustees for his exclusive benefit, could not maintain this action to recover the deeds:

Fourthly—that the residuary clause, so far as regarded the house, must be taken to have been revoked by the codicil or testamentary memorandum stated in the case; or that such codicil or testamentary memorandum, which was intended by the testator to supply an omission in the second

1833.

BARCLAY v. COLLETT.

Petersdorff (*Wilde*, Serjeant, was with him), for the plaintiffs.—By the residuary clause, all the real and personal estate not specifically disposed of, passed absolutely and unconditionally to the trustees. The words used are the most clear and comprehensive that could have been selected. If entitled to the legal interest in the house in question, it follows that the trustees are entitled to the possession of the title deeds. The devise in question being clear and comprehensive, unequivocal and unambiguous, its effect is not to be controlled by mere inferences to be drawn from the general tenor of the will. *Doe* d. *Gallini* v. *Gallini*, 2 N. & M. 615, 5 B. & Ad. 621 (23), which is one of the leading cases of modern times upon this subject, and where all the earlier authorities are commented upon, shews the strong disinclination of the courts to destroy the effect of a particular devise by reference to a general presumed intention of the testator. It will probably be urged on the other side that the heir at law is only to be disinherited by express words, necessary implication, or demonstration plain. But here we have express and most appropriate words; and the heir at law is himself a devisee. Where lands are once effectually devised, there can be no resulting trust to the heir—1 Sanders on Uses, 241.

Upon reference to the cases, it will be found, that, whereven a question has been raised as to the operation of the residuary clause on real estate, there has been something ambiguous or equivocal in the language employed. In some of the cases, particular expressions have been found indicating an intention to exclude real estate; in others, the intention to include real estate has not been

schedule to his will, must be taken therewith, and held to vest the premises in the defendant:

Fifthly—that the defendant was beneficially interested in a certain share of the house, and therefore the plaintiffs were not entitled to recover the deeds.

(23) Affirmed on error, 4 N. & M. 894, 3 Ad. & E. 341.

1838.

BARCLAY v. COLLETT.

clearly defined; and, again, in others, the courts have been led by the use of equivocal expressions, to resort to other parts of the will, in order to ascertain the intention of the testator.

Thus, in *Roe* d. *Helling* v. *Yeud*, 2 New Rep. 214, where the testator, after directing his debts and funeral expenses to be paid by the executors, and making several bequests of annuities and money, gave to his five grandchildren, whom he appointed executors, "all the remainder of my property whatever and wheresoever, to be divided equally, share and share alike, after their paying and discharging the before-mentioned annuities, legacies, and demands, or any I may hereafter make by codicil to this my will; all my goods, stocks, bills, bonds, book debts, and securities in the Witham drainage in Lincolnshire, and funded property;" it was held that his real estate did not pass under the residuary clause. Sir James Mansfield there said: "Though I think that these general words would be sufficient to carry real estate if not explained, yet, as the words stand, I think it doubtful whether the testator so intended or not; and as the intention is not clear, the claim of the devisees must fall to the ground, and the title of the heir at law prevail." So, in *Doe* d. *Hick* v. *Dring*, 2 M. & S. 448, it was held that a devise of "all and singular my effects of what nature or kind soever," will not pass the real estate, where it cannot be collected from the will itself that such was the testator's intention. And in *Doe* d. *Bunny* v. *Rout*, 7 Taunt. 79, where the testatrix bequeathed to her sister "all my stock in trade, household goods, wearing apparel, ready money, securities for money, and every other thing my property, of what nature or kind soever, to and for her own proper use and disposal;" it was held that land did not pass, the expressions being controlled by indications which rendered the testratrix's intent uncertain.

In *Hardacre* v. *Nash*, 5 T. R. 716, A. by will gave two

1838.

BARCLAY v. COLLETT.

legacies of 150*l.* each to his son and daughter, to be paid at twenty-one; he then gave all his realty and personalty to his wife for life, and, after her death, one freehold estate to the son and another to the daughter; "but, if either or both of his children should die before the wife, then those *legacies* which were left to them should return to the wife:" and it was held, that, on the death of the son before the mother, the mother was entitled to the reversion of the freehold estate. In *Doe* d. *Andrew* v. *Lainchbury*, 11 East, 290, it was held that a devise of all the residue of the testator's "money, stock, *property*, and *effects*, of what kind or nature soever," to A. and B., "to be divided equally between them, share and share alike," will pass *real* as well as *personal* estate, where from other parts of the will it appeared that the testator had applied the words *property* and *effects* to real estate. And in *Doe* d. *Wall* v. *Langlands*, 14 East, 370, a testator possessed of real and personal property, after several pecuniary legacies, "gave and bequeathed all and every the residue of his *property*, goods, and chattels, to be divided equally between A. and B., share and share alike, after all his debts paid:" in fact the personalty was not quite sufficient to pay all the debts and legacies: but it was held that the word *property*, though thus followed by *goods and chattels*, was sufficient of itself to carry the realty.

In *Bebb* v. *Penoyre*, 11 East, 160, it was held that the fee did not pass by a residuary clause whereby the testator, after several pecuniary bequests, ordered the lease of his house, with his furniture, to be sold, and *all the rest and residue to be divided* amongst other persons, and appointed executors; for, such division of the *rest and residue* must be intended to be made by the *executors* as such, and therefore confined to personal property. In *Doe* d. *Hurrell* v. *Hurrell*, 5 B. & Ald. 18, where a testator having both real and personal estate, after giving

1838.

BARCLAY v. COLLETT.

several pecuniary legacies, bequeathed all the rest and residue of his estate and effects, whatsoever and wheresoever, to trustees, their executors, administrators, and assigns, upon trust that they should, out of such residue of the monies and effects that he should die possessed of, carry on, manage, and cultivate the farm then in his possession for the remainder of his term therein, for the joint advantage of certain of his sons and daughters therein named; and, at the expiration of the said term, upon further trust to sell and dispose of such residue of his estate and effects, or such effects as should then be upon his said farm, and to divide the money arising therefrom among his said sons and daughters: it was held that the testator's real estate did not pass by the will. In *Doe* d. *Spearing* v. *Buckner*, 6 T. R. 610, the testator, having given 4,000*l.* to A. and B. in trust for certain persons, by a residuary clause gave "all the residue of his estate and effects of what nature soever to A. and B., *their executors and administrators*, in trust to add the *interest* to the *principal*, so as to accumulate the same, it being his will that the residue should not pass but at the time and manner as the principal sum of 4,000*l.* was directed to be paid:" and it was held that a house, the only freehold of which the testator was seised, did not pass by the will, notwithstanding there were general words in the introductory clause, "as to all his *estate* and effects, both *real* and personal." And in *Camfield* v. *Gilbert*, 3 East, 516, where one seised in fee of real estate, by her will first made a disposition of her real estate to two persons for life, reserving a rent-charge out of the same, payable first to her uncle for life, and then to her heir at law *for life;* which, "together with the repairs during the term, should be considered as *his rent* for the said farm;" and afterwards she proceeded to make a disposition of her personal property, and then bequeathed and devised "all the rest, residue, and remainder of her *effects* wheresoever and

1838.

BARCLAY v. COLLETT.

whatsoever, and of what nature, kind, or quality soever (*except* her wearing apparel and plate), to certain nephews and nieces, to be equally divided between them by her *executors*:" it was held that the reversion in fee in the real estate did not pass by the residuary clause, but descended to the heir at law, although he had a rent-charge devised to him for his life out of the same estate in the hands of the tenant for life.

Trying the residuary clause in this will by each of these tests, the court will feel no difficulty in holding it to be a perfect devise of the real estate.

The memorandum or codicil of the 13th February, 1828, not having been duly attested, can have no legal operation at all, and cannot be received for the purpose of controlling the express words of the will.

Channell (*Scriven*, Serjeant, was with him), contrà.—It may at once be conceded that the memorandum of the 13th February, 1828, can neither operate as a codicil to pass real estate, nor as a partial revocation of the will: but it is submitted, that, regard being had to the general scope of the will, it manifestly appears that it was not the testator's intention to pass the house in question by the residuary clause; or that, at all events, the devise is void for uncertainty. It is laid down by Parke, J., in *Doe* d. *Templeman* v. *Martin*, 4 B. & Ad. 785, as a general rule "that all facts relating to the subject matter and object of the devise, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in the will." Looking at the whole of this will, it is impossible that the court can arrive at any other conclusion than that the house in question was not intended to pass by the residuary clause. The testator was possessed of no other freehold property than the house in question

1838.

BARCLAY v. COLLETT.

and that specifically mentioned in the first, second, third, and fourth schedules: and the house in question was that in which the testator formerly carried on business, and which was at the time of his death occupied by his eldest son. Throughout the will no power is given to the trustees to sell or to lease any part of the real estate: but the residuary clause expressly points to a trust to *divide* the property when the testator's youngest child should attain the age of twenty-five. If the construction contended for on the part of the plaintiffs be correct, the situation of the property will be this—as to one eighth it would be strictly entailed, as to three eighths, it would go to the testator's three sons in fee, and as to the remaining four eighths it would be altogether undisposed of, or with so much uncertainty as to prevent the trustees from dealing with it, without the aid of a court of equity. To control the express words of a particular devise, the contrary intention must undoubtedly be manifest: but the question here is whether the words of this devise are clear and unambiguous. Connecting the devise with the trusts, which are incorporated in it by reference, the devise to the trustees is not free from ambiguity: it does not appear whether it is to follow the trusts declared as to the real, or those declared as to the personal property; and therefore the devise is void for uncertainty—*Leslie* v. *The Duke of Devonshire*, 2 Bro. C. C. 187; *Jones* d. *Henry* v. *Hancock*, 4 Dow, 145. If the devise to the trustees be void for uncertainty, the present action is not maintainable. There would then be a resulting trust in favour of the heir at law. A devise upon a future contingency, with no intermediate disposition of the rents and profits, creates a resulting trust for the heir—*Hopkins* v. *Hopkins*, 1 Atk. 581; *Attorney-General* v. *Bowyer*, 3 Ves. 725.

Petersdorff, in reply.—There is no ambiguity in the devise in question. It is said that the directions as to the

1838.

BARCLAY v. COLLETT,

ulterior disposition of the property, create a difficulty as to the mode of disposing of it. But no authority has been cited to shew that that circumstance is to have any effect upon the judgment of the court in construing the will. In *Doe* d. *Burkitt* v. *Chapman*, 1 H. Blac. 223, a devise of "all the rest and residue of my estate of what nature or kind soever," was held to include real as well as personal property, though accompanied with limitations peculiarly applicable and usually applied to personal property alone. *Dally* v. *King*, 1 H. Blac. 1, as far as it goes, is an authority to the same effect. The circumstance of there being no power given to the trustees in this case to lease or to sell, no doubt occasions inconvenience; but it does not necessarily destroy the devise to the trustees.

[*Tindal*, C. J., observed that the difficulty the court felt was as to the existence of a resulting trust at law where the intention was uncertain; and asked *Channell* if he was prepared with any case in a court of law upon the point. *Channell* admitted that he was not.]

TINDAL, C. J.—It appears to me, that, upon the proper construction of the residuary clause of this will, the trustees take the legal interest in the house and premises in question, and consequently are entitled to the possession of the title deeds as incident thereto. In considering the question presented to us, we must dismiss from our minds the memorandum or codicil of the 13th February, 1828: being attested by one witness only, it cannot operate either as a testamentary paper or as a revocation of any other part of the will. Whatever may have been the intention of the testator, we must, however the result may be to be regretted, decide according to the rules of law. After several specific devises and bequests, the testator by the residuary clause devises as follows:—"All the rest, residue, and remainder of my real and personal estate and effects whatsoever and wheresoever, I give, devise, and

1838.

BARCLAY v. COLLETT.

bequeath unto my said trustees, their heirs, executors, administrators, and assigns, in trust to divide the same equally amongst my children when my youngest child shall attain the age of twenty-five years, so and in such manner that the shares of each of my children of and in the said residue may be held and enjoyed upon the same trusts, and be subject to the same contingencies and bequests over, as their respective original legacies are subject and liable to under and by virtue of this my will." The contention on the part of the defendant is, that the trusts of the will are so complicated or so uncertain that the court must see a want of intention in the testator to pass the freehold house in question by this residuary clause. It certainly does appear that the trustees would have a difficult and embarrassing task to dispose of the house according to the trusts of the will: but I cannot thence infer such an absolute want of intention to dispose of that house as will create a resulting trust in favour of the heir at law. It may be that the trustees will have to seek the aid of a court of equity. It is not necessary, however, for us to consider that: it is enough to say that there is a clear devise of the legal estate to the trustees. The trusts are not so uncertain as to warrant us in holding that there are no trusts at all; and therefore we are bound to hold that the trustees take the legal estate, and are consequently entitled to the possession of the title deeds.

PARK, J.—The difficulties the trustees may have in the settlement of the property pursuant to the directions of the will, cannot influence our decision. Putting out of view the memorandum of the 13th February, 1828, the legal interest in the property in question is by the residuary clause clearly vested in the trustees; and the right to the possession of the deeds will of course follow the title to the house. The plaintiffs are entitled to judgment.

1838.

BARCLAY v. COLLETT.

VAUGHAN, J.—I am of the same opinion. We are not at liberty to speculate upon the intention of the testator, except as far as such intention is expressed upon the face of the will. The codicil, as it is called, must be wholly excluded from our consideration. Looking at the residuary clause, I think it is impossible that the legal estate could have been conveyed to the trustees in a manner more precise and clear. It is no doubt extremely probable that the house in question had escaped the attention of the testator when specifically disposing of his property: but he clearly did not intend to die intestate as to any part of it. Difficulties may attend the distribution of the property even in equity: but with that we have nothing to do.

COLTMAN, J.—It certainly is extremely probable that the testator when making the residuary clause was not contemplating the house in question; but that is no reason why it should not pass under it. The residuary clause is commonly intended to cover all property that has been omitted in the other parts of the will. It certainly is open to doubt how the trusts of this will are to be ultimately performed; though I incline to think the difficulty is not insurmountable. But, even supposing the trusts cannot be carried into effect without the aid of a court of equity, that is no ground for disregarding the clearly expressed intention of the testator in the particular devise. The defendant not being entitled to the legal estate, is of course not entitled to the possession of the title deeds.

Judgment for the plaintiffs.

1838.

Friday, June 1st.

In a country ejectment, the declaration was served before Easter Term, with a notice to the tenant to appear in that term:—Held, that a motion for judgment against the casual ejector might be made in Trinity Term.

DOE *d.* BARTH *v.* ROE.

THIS was a country ejectment. The declaration was delivered before the last Easter Term, the notice requiring the tenant in possession to appear in that term.

Archbold, on a former day in this term, upon the authority of *Doe* d. *Wilson* v. *Roe*, 4 Dowl. 124, obtained a rule nisi for judgment against the casual ejector.

Petersdorff now shewed cause, relying upon the rule of Easter Term, 2 Geo. 4, which provides, "that, in all country ejectments which hereafter shall be served before the essoign day of any Michaelmas or Easter Term, the time for the appearance of the tenant in possession shall be within four days after the end of such Michaelmas or Easter Term, and shall not be postponed till the fourth day after the end of Hilary or Trinity Terms respectively following," and contending that the motion should have been made in the term in which the tenant was required to appear.

Archbold, in support of his rule, submitted that, in country causes circumstanced like this, the motion for judgment was in time if made in the term after that in which (not being an issuable one) the tenant was called upon to appear.—He cited *Doe* v. *Roe*, 1 Dowl. 495, 2 Tyr. 724; *Doe* v. *Roe*, 2 Dowl. 196; *Doe* d. *Thomson* v. *Roe*, 3 Dowl. 575; *Doe* d. *Greaves* v. *Roe*, 4 Dowl. 88.

PER CURIAM.—The practice seems to have been settled by the cases cited.

Rule absolute.

1838.

Tuesday, June 5th.

Obtaining a rule for a special jury, after a peremptory undertaking, the cause being a proper one to be tried by a special jury, is not such a default as is contemplated by the statute 14 Geo. 2, c. 17.

Sir W. TWYSDEN *v.* STULZ.

AFTER a peremptory undertaking to try, the plaintiff obtained a rule for a special jury, thereby preventing the cause from being tried at the Sittings after the last term.

Hoggins obtained a rule nisi for judgment as in case of a nonsuit for the alleged default.

Fitzjames shewed cause, contending that the setting the cause down as a special jury cause was not such a default as was contemplated by the statute 14 Geo. 2, c. 17.

Hoggins, in support of his rule.—In *Ward* v. *Turner*, 5 Dowl. 22, it was held, that, where a plaintiff has given a peremptory undertaking to try at a particular Assize, and he is prevented from fulfilling it by the sudden illness of the judge, that is not a sufficient excuse to prevent the defendant from obtaining judgment as in case of a nonsuit. Coleridge, J., says: "The question is whether there was any default on the part of the plaintiff at the next Assizes. In one sense there was none, as there was no moral fault, and no neglect on his part; but, in the sense of a condition, it was a peremptory undertaking to be responsible, though he had no control over the circumstances which prevented the trial. The plaintiff should have applied in Michaelmas Term to enlarge his peremptory undertaking, and if that had been done no doubt the court would have looked into all the facts of the case." So here, the plaintiff has taken a step to defeat his peremptory undertaking. If he had any ground for it, he might have obtained an enlargement of his peremptory undertaking.

1838.

TWYSDEN v. STULL.

TINDAL, C. J.—Whether or not the making a cause a special jury cause is a default within the statute, will depend upon whether or not it is a reasonably proper cause to be tried by a special jury. I think the rule may be discharged on a peremptory undertaking to try at the Sittings after term.

The rest of the court concurring—

Rule accordingly.

DAVIES and Wife, Demandants, WILLIAM SELBY LOWNDES, Tenant.

Wednesday, June 13th.

The court refused to direct the jury process on the trial at bar of a writ of right for the recovery of lands in Buckinghamshire, to be awarded to the sheriff of Middlesex, upon a suggestion that the tenant was possessed of large property and great popularity and influence in the former county, and the demandants poor and obscure persons resident in Wales.

THIS was a writ of right brought for the recovery of estates in the county of Buckingham.

A trial was had at the bar of this court in Trinity Term, 1835, when a verdict was found for the tenant—see 2 Scott, 71. The demandants having tendered a bill of exceptions to the ruling of the court upon that occasion, the exceptions came on to be heard before the Exchequer Chamber, when that court in Easter Vacation, 1835, ordered a venire de novo—see 5 Scott, 835.

Sir *W. Follett*, on the part of the demandants, now moved that the jury process on the venire de novo might be awarded to the sheriff of Middlesex, instead of the sheriff of Buckinghamshire. The motion was founded upon the affidavit of the attorney for the demandants, who deposed—that, previously to the trial of the issue in this cause which was had at the bar of this court on the 27th of April, 1835, the deponent attended with the agent for the under-sheriff of the county of Buckingham, upon several persons eligible to serve as knights to choose recognitors before whom the said trial was to be had, and that the deponent experienced much difficulty in procur-

1838.

DAVIES Dem., LOWNDES Ten.

ing the same to attend, many of such persons excusing themselves, and expressing their wish not to attend in such capacity, owing, as they then stated to deponent, (who verily believed the same to be true) to their being connected and on terms of intimacy and friendship with the above-named tenant; that some of such persons expressed their opinion to the deponent upon the claim of the said demandants; that deponent had cause to believe, from these and other reasons since and lately discovered by deponent, that strong prejudice had been created and now existed against the claim of the demandants throughout the said county of Buckingham; that the above-named tenant was in the actual possession or receipt of the rents of the estates and lands in question in this cause, which were all situate in Buckinghamshire, and was also possessed of other large estates in the same county; that the above-named tenant had himself a large connection, and also many relatives and friends residing within the said county of Buckingham, all of whom, as well as the said tenant, possessed much influence throughout the said county; that the said tenant had (as deponent verily believed) represented the said county of Buckingham in parliament, and that he and one or more of his sons were now, or some or one of them were or was lately in the commission of the peace for the said county, and were all on terms of intimacy with all the gentry, and particularly such as were competent to serve as knights or recognitors for the said county, as also with those residing in the adjacent counties; that the demandant Elizabeth Davies was born and resided in Wales, as also did all her ancestors through whom she claimed, and that she and they were unknown and entire strangers to any person within the said county of Buckingham; that, as a trial of this issue had been ordered to be had at the bar of this court, much expense and probably much delay would be saved to the parties, if the writ of summons and other jury pro-

1838.

DAVIES Dem., LOWNDES Ten.

cess should be awarded to the county of Middlesex instead of to the county of Buckingham.

TINDAL, C. J.—The distance being so inconsiderable, the expense cannot be materially increased by the jury process being directed to the sheriff of Buckinghamshire; and it would almost be casting a slur upon the county to accede to the application. However, the other side may possibly consent. The rule may go.

R. V. Richards now shewed cause.—He submitted that there was nothing in the affidavit upon which the motion was founded to induce the court to suppose that the tenant exercised undue influence in Buckinghamshire, or to doubt the integrity of the gentlemen qualified to serve as grand jurors for that county.

Sir *W. Follett*, and *E. V. Williams*, in support of the rule.—The tenant in his affidavit does not attempt to deny that a strong prejudice does exist in Buckinghamshire in his favour. And it is manifest that the course suggested would be very much less expensive to the parties. In *Lord Shaftesbury* v. *Graham*, Skinner, 44, the court said, that, if potency or any other reasonable cause were sworn to them, they would alter the venue: and Dolbin, J., cited the case of *Lord Gerard of Bromley* v. *Spencer*, in the Exchequer, when Hale was Chief Baron, who, upon affidavit that Lord Gerard and his ancestors had lived long in Lancashire, and kept great hospitality, and did every body welcome &c., and that Spencer was a Southern gentleman, and lately come into Lancashire, Hale did not suffer them to proceed in their ejectment in Lancashire, but made them try it by a jury of Hertfordshire. And in *The Earl of Kildare* v. *Eustace*, 1 Vern. 437, Lord Chancellor Jefferies cited *Sir William Tyrringham's* case, who being so powerful that right could not be had against him

1838.

DAVIES Dem., LOWNDES Ten.

in the county of Bucks, the venue was changed upon a bill brought in Chancery purely for that purpose.

PER CURIAM.—The affidavit upon which this motion is founded does not disclose circumstances to warrant our interfering in the matter. The county of Buckingham is not now in so barbarous a state as it probably was in at the time to which Lord Chancellor Jefferies refers in the case last cited.

Rule discharged, without costs.

Wednesday, June 6th.

To a count on a bill of exchange (against the acceptor), the defendant pleaded that the bill was not duly stamped or marked with any proper stamp or mark denoting that the lawful, requisite, and proper rate or duty chargeable or charged thereon had been or was duly stamped, marked, or impressed thereon: —Held, bad on special demurrer, inasmuch as it was left in doubt whether the bill was altogether unstamped, or stamped with a stamp of a higher or lower value than required by law.

HAWARD *v.* SMITH.

TO a count in assumpsit on a bill of exchange for 50*l.*, drawn by the plaintiff upon and accepted by the defendant, payable three months after date—

The defendant pleaded *that the bill was not* at the time when it was so made as in the declaration mentioned, or at any time since, nor is the same, *duly stamped or marked with any proper stamp* or mark denoting that the lawful, requisite, and proper rate or duty chargeable or charged thereon had been or was duly stamped, marked, or impressed thereon, contrary to the form and effect of the statute in such case made and provided—verification.

To this plea the plaintiff demurred specially—assigning for causes, that no issue of matter of fact could be raised upon it, nor was any matter of fact at all stated or denied in it; that it appeared that the defence intended to be raised by the plea, was, that the bill was not or is not properly stamped, and yet the plea did not describe the stamp, nor shew what stamp was or is stamped upon the said bill, and therefore the plaintiff was precluded either from confessing and avoiding the said plea, and also from traversing or demurring to it; that the plea did not shew

in what respect the stamp was improper or insufficient, nor what were the facts or circumstances by reason whereof the stamp had been or was unduly stamped upon the said bill; and that the plea was also equivocal and uncertain, because it might either mean that the bill was not stamped at all, or that it was stamped insufficiently (24).

The defendant joined in demurrer.

Peacock, in support of the demurrer.—The want of a stamp is not properly the subject of a plea; it is a question that would arise when the bill is offered in evidence. At all events, the question is not well raised here. Whether the bill is duly stamped or not, is a mixed question of law and fact—the existence or non-existence of the stamp being a question of fact; its sufficiency a question of law. In *Hume* v. *Liversidge*, 1 C. & M. 332, 3 Tyr. 257, to debt on a bail-bond, the defendant pleaded that no proper affidavit of debt was filed in the original action, and it was held bad on demurrer, being so framed that no direct issue could be taken on it. And in *Ashby* v. *Harris*, 2 M. & Welsby, 673, it was held that a declaration against a sheriff for extortion in the execution of a fi. fa., must state the sum actually taken by him; and that it is not sufficient to allege that he took 1*l.* 16*s.* 2*d.* more than by the statute is allowed. Here the plea should at least have stated either that there was no stamp, or what the particular stamp was.

Bere, in support of the plea.—Whether or not a thing is *duly* done, means no more than whether or not it is done according to law: and the introduction of that word, therefore, always raises a mixed question of law and fact.

(24) The plea was stated to have been pleaded before it was decided in Dawson v. Macdonald, 2 M. & Welsby, 26, that the fact of the bill being improperly stamped was admissible as a defence under the plea of non-acceptance.

1833.

HAWARD v. SMITH.

The proposition that the plea is bad because it involves matter of law, is clearly too large. The existence or the absence of reasonable or probable cause, in an action for a malicious prosecution, is a mixed question of law and fact, and yet it is always submitted to the jury. Whether the bill was stamped at all or not, is clearly a question of fact. [*Tindal*, C. J.—A noncompliance with the provisions of the stamp act does not render the bill ipso facto void.] An improper stamp is the same as no stamp at all: and there can be no pretence for saying that the plaintiff might not have traversed the allegation that the bill was not duly stamped.

Peacock, in reply.—The plea raises a question which the plaintiff could not traverse; for, it could not be left to a jury to determine whether one stamp or another were the proper one. [*Tindal*, C. J.—Suppose the issue was whether or not a will had been duly executed; what objection could there be to that? And is not this the same case?] The plea should have specifically shewn in what respect the stamp was insufficient. In *Mure* v. *Kaye*, 4 Taunt. 34, in an action for false imprisonment, the defendants pleaded, that, before the time when &c., certain persons unknown had forged receipts on certain forged dividend warrants, and received the money purporting to be due in respect thereof in bank-notes of the Bank of England, amongst which was a note for 100*l*, which was afterwards exchanged there for other notes, and amongst them one for 10*l*., the date and number of which was afterwards altered; that afterwards, and a little before the time when &c., the plaintiff was *suspiciously* possessed of the altered note, and did in a *suspicious manner* dispose of the same to one A. B., and afterwards, and before the time when &c., in a *suspicious manner* departed and left England, and went to Scotland, and there continued; whereupon the defendants had reasonable cause to sus-

pect, and did suspect, that the plaintiff had forged the said receipts; whereupon they gently laid their hands upon him, and carried him to and detained him in a certain gaol in Scotland, in order that he might be conveyed, by a warrant to be issued by a justice of the county of Middlesex, to be dealt with according to law: and the plea was held bad on demurrer; for that it was necessary to shew in pleading the causes of suspicion in certainty, in order that the court may judge of their reasonableness, and using the term "suspicious" would not aid what was necessary to be averred. And the court of King's Bench lately, in a case of *Lloyd* v. *Harris*, which was an action on the case of arresting a privileged person, held the declaration bad on general demurrer, for not shewing the nature of the privilege claimed. Suppose this bill should turn out to be stamped with an improper stamp, but one of an equal or a higher value than the proper stamp, it would still be available; the stamp act, 55 Geo. 3, c. 184, containing a provision (s. 10) that "all instruments for or upon which any stamp or stamps shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon, shall nevertheless be deemed valid and effectual in the law; except in cases where the stamp or stamps used on such instruments shall have been specifically appropriated to any other instrument, by having its name on the face thereof."

TINDAL, C. J.—I think the argument last addressed to the court is conclusive to shew that this plea is insufficient. It leaves it in doubt what is the answer intended to be set up—whether the bill was altogether unstamped, or stamped with a stamp of a value lower or higher than required by law. I therefore think the plaintiff is entitled to judgment.

The rest of the court concurring—

Judgment for the plaintiff.

1838.

Wednesday, June 6th.

HEBDEN and Another *v.* RUEL.

Quære, whether de injuriâ is a good replication in an action of debt.

DEBT for *5l.*, for the price and value of goods sold and delivered by the plaintiffs to the defendant at his request.

Plea—that the goods, the price and value whereof were in the count sued for, were part and parcel of a certain quantity of goods which theretofore (to wit) on &c., were bargained for between the plaintiffs and the defendant according to a certain sample then produced by the plaintiffs to the defendant, wherewith if they had corresponded they would have been worth to the defendant, and he the defendant in that event agreed to give the plaintiffs for the same *23l.* 0*s.* 11*d.*; and that he, the defendant, confiding in the said sample, afterwards, and before the delivery to him of the said goods so bargained for as aforesaid (to wit) on the day and year aforesaid, paid to the plaintiffs the sum of *20l.* on account of the said goods; and that, afterwards (to wit) on &c. aforesaid, upon the said goods so bargained for as aforesaid being delivered to the defendant, the same did not correspond with the said sample so as aforesaid produced by the plaintiffs to the defendant, and, upon being then compared therewith, they were found to be, and then in truth and in fact were, of a much smaller and less value than if they had corresponded with the said sample, and also of a much smaller and less value than the said sum so paid on account thereof as aforesaid (to wit) of the value of 17*l.* 18*s.* 3½*d.* only, and no more—verification.

Special demurrer.

To this plea the plaintiffs demurred specially—assigning for causes, that it amounted to the general issue, inasmuch as the effect of it was, that the defendant was never indebted to the plaintiffs in a larger sum than the sum of 17*l.* 18*s.* 3½*d.*, and that he had paid all that was due before or when it became due; that it amounted in substance to no more than an allegation that the defendant never promised

1838.

HERDEN v. RUEL.

to pay the said sum in the count mentioned; that it was double, and offered no fair point for the plaintiffs to take issue upon, inasmuch as if the plaintiffs were to deny that the goods were only of the value alleged by the defendant, they must admit that the goods were guaranteed to be according to the sample, and if they were to deny that the goods were guaranteed according to sample, they must admit that they were of the small value only alleged by the defendant, neither of which admissions would if proved constitute of itself a sufficient defence to the action, but, if one were proved and the other admitted, though false, would, taken in conjunction, be a sufficient defence; and also that the plea was in that respect argumentative, and was in other respects insufficient and informal &c.

The defendant joined in demurrer.

Barstow, in support of the demurrer.—The plea shews that there never was any moment of time when the defendant was indebted to the plaintiffs for goods sold and delivered. The situation of the parties is this: the defendant had paid 20*l.* on account, and the plaintiffs afterwards delivered goods of the value of 17*l.* 18*s.* 3½*d.* This is clearly an argumentative denial of the contract declared on, and amounts to never indebted. In *Hayselden* v. *Staff*, 5 Ad. & E. 153, 6 N. & M. 659, a plea to a count for work and labour, that the work was done under an agreement that the plaintiff should receive no remuneration for his services, if, as the event was, they should prove useless, was held bad on special demurrer, as amounting to the general issue. Lord Denman, in delivering the judgment of the court, there says (5 Ad. & E. 158): "One of the general objects of the new rules was, to compel a defendant to put his defence specially upon the record. And in conformity with this object the case of *Edmunds* v. *Harris*, 2 Ad. & E. 414, 4 N. & M. 182, was decided. It was an action of debt for goods sold and delivered, to be paid for

1838.

HEBDEN v. RUEL.

on request, and which as to this is the same thing as indebitatus assumpsit; to which there was a plea of never indebted: and it appeared on the trial that the goods were sold on a credit which had not expired when the action was brought; and on a question whether this defence was admissible on the general issue, the court of King's Bench held it was not, and that it ought to have been specially pleaded, and that it was one of the cases which the new rules were framed to avoid. But that case was doubted in *Taylor* v. *Hilary*, 1 C. M. & R. 741, 5 Tyr. 973, on the ground that, if the time of credit has not expired, the plaintiff proves a different contract from that which he has stated in his declaration, which was to pay on request. And so also in *Knapp* v. *Harden*, 1 Gale, 47, Parke, B., considered it as doubtful whether *Edmunds* v. *Harris* was properly decided. We think therefore that the case of *Edmunds* v. *Harris* cannot be considered as a binding authority; and, if not, as the defence set up on this record shews a different contract from that which is stated in the declaration, inasmuch as the contract stated in the plea is that the money should be paid on a certain condition which has not been performed; it is not a contract to pay on request; and therefore the defence might be gone into upon the general issue." In *Alexander* v. *Gardner*, 1 Scott, 281, 3 Dowl. 146, the declaration was for goods bargained and sold: the defence was that they were sold under a special contract that they should be shipped within the current month, and landed in London within a given time, which was not done. On an application for leave to plead several matters, the question was whether these facts could have been given in evidence under the general issue, or whether it was necessary to plead them specially. This court said it was unnecessary to plead them: the contract might be given in evidence under the general issue. And in *Cousins* v. *Paddon*, 2 C. M. & R. 547, 5

Tyr. 535, it was held, that, in debt for goods sold and delivered, and work and labour, the defendant may give in evidence, on the general issue of never indebted, that the goods were worthless, and the work useless.

1838.
HEADEN v. RUSL.

White, contrà.—By the rule of Hilary Term, 4 Will. 4, 2nd division, "Covenant and Debt," r. 3, it is provided, that, "in actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that 'he never was indebted in manner and form as in the declaration alleged,' and such plea shall have the same operation as the plea of non assumpsit in indebitatus assumpsit; and all matters in confession and avoidance shall be pleaded specially as above directed in actions of assumpsit." And in title "Assumpsit," r. 1, it is provided, that, "in an action of indebitatus assumpsit for goods sold and delivered, the plea of non assumpsit will operate as a denial of the sale and delivery in point of fact." Except for the introduction of the allegation as to the payment of the 20*l.* (which by the new rules was necessary), the plea would have admitted a prima facie liability to the value of the goods. In *Goodchild* v. *Pledge*, 1 M. & Welsby, 363, to debt for 20*l.* for goods sold and delivered, the defendant pleaded, that, before the commencement of the suit, and when the said sum of 20*l.* became due and payable, to wit, on &c., he the defendant paid the plaintiff the said sum of 20*l.* according to the defendant's said contract and liability: and Alderson, B., said: "If this is payment, it is payment of a *debt:* then it admits a debt; therefore it is in discharge, not in denial." So, here the plea, though special, is a plea of payment. [*Vaughan*, J.—The plea sets up a contract at variance with that declared on.] It confesses the defendant's liability to pay, on request, so much as the goods are worth, and avoids it by reason of the special contract that the goods should agree with the sample. [*Tindal*, C. J.

1838.

HEBDEN v. RUEL.

—Could the defendant, under a plea of never indebted, give in evidence the payment of the 20*l.* before the delivery of the goods?] Clearly not (25). In debt, where there is no plea of payment, the defendant cannot give evidence of payment in reduction of damages—*Belbin* v. *Butt*, 2 M. & Welsby, 422, 5 Dowl. 604; *Ernest* v. *Brown*, 4 Scott, 385, 5 Dowl. 637.

TINDAL, C. J.—I cannot help thinking that the demurrer does not point at the precise ground of objection to this plea. I do not see why the whole might not have been put in issue under the general replication de injuriâ.

Barstow suggested that it was doubtful whether de injuriâ was a good replication in debt. But it was ultimately agreed that the demurrer should be withdrawn, and de injuriâ replied; the defendant undertaking not to demur; and the costs to be costs in the cause.

Rule accordingly (26).

(25) See the new rule, ante, p. 354.

(26) See Jones v. Senior, 4 M. & Welsby, 123. There, to a declaration on bills of exchange for 520*l.*, drawn by M. upon and accepted by the defendant, and indorsed by M. to the plaintiffs, the defendant pleaded, that, before the accepting of the bills, he was indebted to M. in a larger amount, and that they were accepted on account of 520*l.*, part of the debt; that, after the acceptance, and before the bills became due, the defendant was also indebted to other persons named, and was embarrassed in his circumstances, and unable to pay his debts in full; and thereupon, by an instrument in writing made between M. and the said other persons of the one part, and the defendant of the other, and subscribed by M. and the several persons whose debts were set against their names, they agreed to receive from the defendant a composition of 7*s.* in the pound on their respective debts, payable on a day named (which was after the bills became due). The plea then averred payment of the composition by the defendant to M. and the other subscribing creditors; and also, that, afterwards, and before the commencement of the suit, M. paid to the plaintiffs, and they received from him, divers sums of money, amounting

1838.

LINE *v.* STEPHENSON and CAMERON, Executors of THOMAS GUTTERSON, deceased.

Friday, June 8th.

THIS was an action of covenant. The declaration stated, that, theretofore, to wit, on the 27th October, 1836, by a certain indenture then made by and between Thomas Gutterson of the one part, and the plaintiff of the other part [profert], the said Thomas Gutterson, for the considerations therein mentioned, did *demise*, lease, and to farm let unto the plaintiff all those two messuages &c. (describing the premises)—to have and to hold the same unto the plaintiff, his executors, administrators, and assigns, from the 25th December then next ensuing for and during and unto the full end and term of forty-nine years, wanting ten days, from thence next ensuing, and fully to be complete and ended; yielding and paying therefore yearly and every year during the said term unto the said Thomas Gutterson, his executors, administrators, and assigns, the clear rent or sum of 80*l.*, by four equal quarterly payments, on &c. in each and every year, free and clear of and from certain rates and taxes in the said indenture particularly specified: and the plaintiff did by the said indenture covenant, promise, and agree, for himself, his executors, administrators, and assigns, to and with the said Thomas Gutterson, his executors, administrators, and

Under the word "demise" is implied as well a covenant for title as a covenant for quiet enjoyment; but the whole is qualified and restrained by a subsequent *express* covenant for quiet enjoyment.

to a sum sufficient to satisfy all consideration whatever for or in respect of the indorsement of the bills in the declaration mentioned, and all money due from M. to the plaintiffs in respect of the bills or otherwise, and all claims and demands of the plaintiffs in respect of the bills or otherwise on M., in full satisfaction and discharge of the bills, and of all claims and demands whatever in respect of them or otherwise; and that the plaintiffs then became, and thenceforth continued holders of the bills without consideration, and in fraud of the defendant and his creditors. To this plea the plaintiffs replied de injuriâ: and the replication was held bad on special demurrer; for that the plea amounted to matter of *discharge*, not of *excuse*. Crogate's case, 8 Rep. 66.

1838.

HEBDEN v. RUEL.

—Could the defendant, under a plea of never indebted, give in evidence the payment of the 20*l.* before the delivery of the goods?] Clearly not (25). In debt, where there is no plea of payment, the defendant cannot give evidence of payment in reduction of damages—*Belbin* v. *Butt*, 2 M. & Welsby, 422, 5 Dowl. 604; *Ernest* v. *Brown*, 4 Scott, 385, 5 Dowl. 637.

TINDAL, C. J.—I cannot help thinking that the demurrer does not point at the precise ground of objection to this plea. I do not see why the whole might not have been put in issue under the general replication de injuriâ.

Barstow suggested that it was doubtful whether de injuriâ was a good replication in debt. But it was ultimately agreed that the demurrer should be withdrawn, and de injuriâ replied; the defendant undertaking not to demur; and the costs to be costs in the cause.

Rule accordingly (26).

(25) See the new rule, ante, p. 354.

(26) See Jones v. Senior, 4 M. & Welsby, 123. There, to a declaration on bills of exchange for 520*l.*, drawn by M. upon and accepted by the defendant, and indorsed by M. to the plaintiffs, the defendant pleaded, that, before the accepting of the bills, he was indebted to M. in a larger amount, and that they were accepted on account of 520*l.*, part of the debt; that, after the acceptance, and before the bills became due, the defendant was also indebted to other persons named, and was embarrassed in his circumstances, and unable to pay his debts in full; and thereupon, by an instrument in writing made between M. and the said other persons of the one part, and the defendant of the other, and subscribed by M. and the several persons whose debts were set against their names, they agreed to receive from the defendant a composition of 7*s.* in the pound on their respective debts, payable on a day named (which was after the bills became due). The plea then averred payment of the composition by the defendant to M. and the other subscribing creditors; and also, that, afterwards, and before the commencement of the suit, M. paid to the plaintiffs, and they received from him, divers sums of money, amounting

1838.

LINE *v.* STEPHENSON and CAMERON, Executors of THOMAS GUTTERSON, deceased.

Friday, June 8th.

Under the word "demise" is implied as well a covenant for title as a covenant for quiet enjoyment; but the whole is qualified and restrained by a subsequent *express* covenant for quiet enjoyment.

THIS was an action of covenant. The declaration stated, that, theretofore, to wit, on the 27th October, 1836, by a certain indenture then made by and between Thomas Gutterson of the one part, and the plaintiff of the other part [profert], the said Thomas Gutterson, for the considerations therein mentioned, did *demise*, lease, and to farm let unto the plaintiff all those two messuages &c. (describing the premises)—to have and to hold the same unto the plaintiff, his executors, administrators, and assigns, from the 25th December then next ensuing for and during and unto the full end and term of forty-nine years, wanting ten days, from thence next ensuing, and fully to be complete and ended; yielding and paying therefore yearly and every year during the said term unto the said Thomas Gutterson, his executors, administrators, and assigns, the clear rent or sum of 80*l.*, by four equal quarterly payments, on &c. in each and every year, free and clear of and from certain rates and taxes in the said indenture particularly specified: and the plaintiff did by the said indenture covenant, promise, and agree, for himself, his executors, administrators, and assigns, to and with the said Thomas Gutterson, his executors, administrators, and

to a sum sufficient to satisfy all consideration whatever for or in respect of the indorsement of the bills in the declaration mentioned, and all money due from M. to the plaintiffs in respect of the bills or otherwise, and all claims and demands of the plaintiffs in respect of the bills or otherwise on M., in full satisfaction and discharge of the bills, and of all claims and demands whatever in respect of them or otherwise; and that the plaintiffs then became, and thenceforth continued holders of the bills without consideration, and in fraud of the defendant and his creditors. To this plea the plaintiffs replied de injuriâ: and the replication was held bad on special demurrer; for that the plea amounted to matter of *discharge*, not of *excuse*. Crogate's case, 8 Rep. 66.

1838.

LINE
v.
STEPHENSON.

a breach of the express covenant declared upon; that the subsequent allegations as to the loss of the money expended, and as to the not keeping and breaking the covenant, were too general; that the supposed breach or breaches, or what was alleged as such, was merely a state of facts, which, though consistent with the supposition of there having been a breach, may yet have arisen without any breach at all; and that no sufficient breach was alleged.

The plaintiff joined in demurrer (27).

Channell, in support of the demurrer.—The express covenant for quiet enjoyment during the term, qualifies and restricts the covenant to be implied from the word "demise;" and there is no sufficient breach alleged of the express covenant. In *Nokes's* Case, 4 Rep. 80b., the defendant demised to the plaintiff a house in London, by these words, "demise, grant, &c.," and the lessor covenanted that the lessee should enjoy the house during the term, without eviction by the lessor, or any claiming under him; and the lessor was bound to perform all covenants, grants, articles, and agreements &c. in the indenture. The plaintiff granted his term over to a stranger. In debt upon this bond, the defendant pleaded performance of the covenants &c. The plaintiff assigned for breach, that one Savery entered upon the assignee, and made a lease of seven years to one Ducke, if he should so long live, who brought ejectione firmæ against the assignee,

(27) The point marked for argument on the part of the defendants was—"That the general covenant implied by the word 'demise' was restricted by the express covenant; and that the mere want of power to grant the lease was not a breach of the express covenant."

For the plaintiff—"That he was entitled to recover under the circumstances detailed in the declaration; that the covenant implied by the word 'demise' was not restricted by the express covenant; and that the want of power to grant a lease admitted in the pleadings, was a breach of the covenants set out in the declaration."

1838.

LINE v. STEPHENSON.

and recovered by verdict, and had execution: upon which the defendant demurred in law. And it was held by Popham, Chief Justice, et totam curiam, "that the said express covenant qualified the generality of the covenant in law, and restrained it by the mutual consent of both parties, that it should not extend further than the express covenant, quia clausa general 'non refert' ad expressa, in this case." And in *Merrill* v. *Frame*, 4 Taunt. 329, it was held, that, if a lease contain a covenant for quiet enjoyment against the lessor and those who claim under him, the lessee cannot, upon an eviction by a paramount title, recover under the covenant for general title implied in the word "demise." The general rule is laid down in a similar manner in the cases cited in the note in 2 Wms. Saund. 178*a*. There is no allegation here that the plaintiff has been turned out of possession.

Ogle, contrà.—Under the word "demise" is implied as well a covenant in law that the party has power to grant an interest co-extensive with that which he assumes to grant, as a covenant for quiet enjoyment. These are distinct and independent covenants: and it is only the implied covenant for quiet enjoyment that is qualified and controlled by the express covenant. In *Holder* v. *Taylor*, Hobart, 12, Brownlow, 22, Holder brought an action of covenant against Taylor, and declared for a lease for years made by the defendant by the word "demise," which imports a covenant, and then shewed that at the time of the lease made the lessor was not seised of the land, but a stranger, and so the covenant in law broken; but he did not lay any actual entry by force of his lease, nor any ejectment of the stranger, nor any claiming under him: whereupon it was objected that no action of covenant would lie, because there was no expulsion. But the whole court was of opinion that an action did lie; for, the breach of covenant was, in that the lessor had taken upon

1838.

LINE v. STEPHENSON.

him to demise that which he could not; for, the word "demise" imports a power of letting, as "dedi" a power of giving. And it is not reasonable to enforce the lessee to enter upon the land, and so to commit a trespass. [*Tindal*, C. J.—A distinction is there taken between the case of an express covenant, and the covenant implied by law.] It is said at the end of the case—"But, if it were an express covenant for quiet enjoying, there *perhaps* it were otherwise:" but that is mere obiter dictum; and the case is cited in Comyns's Digest, *Covenant* (A. 4.), in Bacon's Abridgment, *Covenant* (B), and in Viner's Abridgment, *Covenant* (G), without any reference to that dictum. In *Fraser* v. *Skey*, 2 Chit. 646, it was held that under the word "demise," the lessee may maintain an action of covenant against the lessor for not having sufficient power to demise for the whole term, whereby the plaintiff was put to expense in procuring a better title for the whole term. [*Vaughan*, J.—In that case there was no express covenant, which makes the whole difference.] In *Burnett* v. *Lynch*, 5 B. & C. 589, 8 D. & R. 368, Littledale, J., says: "An action of covenant will lie by the lessee against the lessor upon the word 'demise' in the lease; but that word imports a covenant in law on the part of the lessor that he has good title, and that the lessee shall quietly enjoy during the term." In Woodfall's Landlord and Tenant (Harrison's edit.), p. 116, it is said that "the implied covenant for quiet enjoyment comprehends a covenant by implication that the lease shall be valid, and not void or voidable; for, of such there could of course be no enjoyment at all: and this principle is the same as that which respects any conveyance; for, where a man undertakes to convey, he undertakes to convey by a good title:" for which are cited *The Duke of St. Albans* v. *Shore*, 1 H. Blac. 280, and *Phillips* v. *Fielding*, 2 H. Blac. 123. And again, p. 504: "It would seem, that, under the word 'demise,' the lessee may maintain an action of covenant

1838.

LINE v. STEPHENSON.

against the lessor for not having sufficient power to demise for the whole term, whereby plaintiff was put to expense in procuring a better title for the whole term (*Fraser* v. *Skey*): so, upon the word 'assign' in an assignment; for, it is as general a word of covenant as 'demise'"—citing 2 Bac. Abr. *Covenant* (B), 65.

The lessee may sue for a breach of the implied covenant for title the moment the covenant is entered into: he is not bound to wait until he is evicted. But he cannot sue in respect of the covenant for quiet enjoyment until an actual eviction has taken place. This shews that the two are distinct covenants. Suppose in this case there had been no express covenant for quiet enjoyment, and no eviction, and the declaration had been in its present form, the plaintiff would clearly be entitled to a verdict with nominal damages: and suppose he had afterwards continued in possession, and, having expended money in improvements, should then have been evicted, he might bring a second action, and recover real damages. Lord Hale, in *Norman* v. *Foster*, 1 Mod. 101, says: "If I covenant that I have a lawful right to grant, and that you shall enjoy notwithstanding any claiming under me; these are two several covenants, and the first is general, and not qualified by the second." "And so said Wylde, J.; and that one covenant went to *the title*, and the other to *the possession*." In *Howell* v. *Richards*, 11 East, 633, releasors covenanted that *for and notwithstanding any act &c. by them or any or either of them done to the contrary*, they had good title to convey certain lands in fee; *and also* that they or some or one of them, *for and notwithstanding any such matter or thing as aforesaid*, had good right and full power to grant, &c.; *and likewise* that the releasee should *peaceably and quietly enter, hold, and enjoy* the premises granted, *without the lawful let or disturbance of the releasors or their heirs or assigns*, or *for or by any other person or persons whatsoever*, and that

1838.

LINE v. STEPHENSON.

the releasee should be kept harmless and indemnified by the releasors and their heirs against all other titles, charges, &c., save and except the chief rent issuing and payable out of the premises to the lord of the fee. And it was held that the generality of the covenant for *quiet enjoyment* against the releasors and their heirs, *and any other person or persons whatsoever*, was not restrained by the qualified covenants for *good title* and *right to convey, for and notwithstanding any act done by the releasors to the contrary.* Lord Ellenborough there says: "The covenant *for title*, and the covenant *for right to convey*, are indeed what is sometimes improperly called synonimous covenants; they are however connected covenants generally of the same import and effect, and directed to one and the same object; and the qualifying language of the one may therefore properly enough be considered as virtually transferred to and included in the other of them. But the covenant for quiet enjoyment is of a materially different import, and directed to a distinct object. The covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey, viz. in this case an indefeasible estate in fee-simple. The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbances thereupon. For the purpose of this covenant, and the indemnity it affords, it is immaterial in what respects, and by what means, or by whose acts the eviction of the grantee or his heir takes place: if he be lawfully evicted, the grantor, by such his covenant, stipulates to indemnify him at all events. And it is perfectly consistent with reason and good sense, that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he purports to convey, than for quiet enjoyment. He may suspect, or even know, that his title is in strictness of law in some degree imperfect; but he may at the

1838.

LINE v. STEPHENSON.

same time know that it has not become so by any act of his own; and he may likewise know that the imperfection is not of such a nature as to afford any reasonable chance of disturbance whatever to those who should take under it: he may therefore very readily take upon him an indemnity against an event which he considers as next to impossible, whilst he chuses to avoid a responsibility for the strict legal perfection of his title to the estate, in case it should be found at any future period to have been liable to some exception at the time of his conveyance. He may have a moral certainty that the existing imperfections will be effectually removed by the lapse of a short period of time, or by the happening of certain immediately then impending or expected events of death or the like: but these imperfections, though cured, so as to obviate any risk of disturbance to the grantee, could never be cured by any subsequent event, so as to save the breach of his covenant for an originally absolute and indefeasible title. The same prudence, therefore, which might require the qualification of one of these covenants, might not require the same qualification in the other of them, affected as it is by different considerations, and addressed to a different object." *Gainsford* v. *Griffith*, 1 Saund. 58 f, *Barton* v. *Fitzgerald*, 15 East, 530, and *Hesse* v. *Stevenson*, 3 B. & P. 565, are authorities to the same effect.

The plaintiff might have declared upon this as an express covenant, according to its legal effect—*Saltoun* v. *Houstoun*, 8 Moore, 546, 1 Bing. 433; *Gainsford* v. *Griffith*, 1 Saund. 58 f; *Barton* v. *Fitzgerald*, 15 East, 530.

Nokes's Case and *Merrill* v. *Frame* are altogether inapplicable to a record framed like this: in each of those cases the plaintiff was suing on the covenant for quiet enjoyment implied under the word "demise;" whereas here the plaintiff is suing on the covenant for power to lease: and in both the cases there was an eviction, a circumstance that does not exist here. The report of

1838.

LEWIS v. STEPHENSON.

Nokes's Case in Cro. Eliz. 674 (*Nokes* v. *James*), differs from that of Lord Coke in this: the dictum that "an express covenant shall take away the covenant in law," is attributed to counsel; and it is said that "to this opinion Popham, J., inclined; but the other justices did not deliver any opinion therein."

The only case that at all militates against the position contended for is that of *Milner* v. *Horton*, M'Clel. 647. There it was covenanted by an indenture of sale that the parties therein named had a good estate in fee-simple in the premises, and had full and absolute title to enfeoff and convey the same, and also that the feoffee should quietly enjoy without let &c. of the said parties, their heirs, or any other persons claiming under them, and that the premises were and should be clear of all incumbrances done &c. by the said parties or one Sir W. H., or any of his ancestors: and it was held that the qualified covenant for quiet enjoyment restrained the general ones. But that case is expressly overruled by *Smith* v. *Compton*, 3 B. & Ad. 189. Lord Tenterden, delivering the judgment of the court, there says: "Looking at all the cases which were cited for the defendants, there is only one, *Milner* v. *Horton*, where a general covenant has been held to be qualified in the manner here contended for, unless there appeared something to connect it with a restrictive covenant, or unless there were words in the covenant itself amounting to a qualification. We have considered *Milner* v. *Horton* again since the argument, and we cannot feel ourselves bound by its authority."

Channell, in reply, was stopped by the court.

TINDAL, C. J.—I am of opinion that the express covenant for quiet enjoyment qualifies and restrains the covenant in law implied from the word "demise." The rule is so laid down in *Nokes's* Case. And I give the prefer-

1838.

LEAK v. SCRIVENER.

ence to Coke's report of that case, rather than to that of Croke. Coke puts it affirmatively, that "it was held by Popham, Chief Justice, et totam curiam, that the said express covenant qualified the generality of the covenant in law, and restrained it by the mutual consent of the parties, that it should not extend further than the express covenant;" and Croke merely mentions it as an inclination of opinion on the part of Popham, C. J. The rule laid down by Lord Coke has been considered to be law from that time to the present. It has been contended in the present case, that, in the word "demise" is implied, not simply one covenant, but two distinct and independent covenants—a covenant that the lessor has power to grant an interest of the nature and to the extent of that which he professes to grant—and a covenant for quiet enjoyment. I am not prepared to deny that proposition: but I do not concur in the argument it is thence proposed to draw—that the express covenant for quiet enjoyment qualifies and restrains the generality of the implied covenant as to the second branch, leaving it untouched as to the first. I agree that covenants for title and for quiet enjoyment may be so worded as to form distinct and independent covenants. That is all that is decided in *Norman* v. *Foster*, *Howell* v. *Richards*, and the other cases cited on the part of the plaintiff. In *Holder* v. *Taylor* and *Fraser* v. *Skey*, the breach was assigned upon the earlier part of the deed; and there was no restrictive covenant. Upon the whole, it appears to me to have been the common understanding of Westminster-Hall from the time of Lord Coke to the present time, that, when the import of the general covenant to be implied from the word "demise" is weakened by the introduction of a subsequent express covenant for quiet enjoyment, its effect is weakened and restrained altogether. I therefore think our judgment must be for the defendant.

1838.

LINE v. STEPHENSON.

PARK, J.—I am of the same opinion. A great deal of learning and research has been bestowed upon this case; but nothing that has been urged seems to me to be of sufficient weight to depose the authority of *Nokes's* case, which has always been held to give the law upon this subject. And, without at all detracting from the merits of Croke, I cannot receive his report in preference to that of Lord Coke: the latter was Attorney-General at the time of the decision in *Nokes's* case; whereas Croke was not a judge until five and twenty years afterwards. *Norman* v. *Foster*, or rather the dictum of Lord Hale in that case, is not necessarily incompatible with the view we are now taking: on the contrary, I think it rather tends to support it; the argument is not put upon the footing here suggested, and for which I find no authority.

VAUGHAN, J.—I am of the same opinion. I think it would be impossible to give judgment upon this record in favour of the plaintiff without shaking the authority of *Nokes's* case, and violating a rule of law that has ever since obtained—that an implied covenant is restrained and controlled by an express covenant. The fallacy of the argument here lies in the assumption that under the term "demise" two distinct and independent covenants are implied. It is true that the decision in *Nokes's* case was against the plaintiff: but, in the fourth resolution—"It was held by Popham, Chief Justice, et totam curiam, that the said express covenant qualified the generality of the covenant in law, and restrained it by the mutual consent of both parties, that it should not extend further than the express covenant." And, at the close of the case, Lord Coke makes these observations: "There is great reason in the principal case, that the particular covenant subsequent should qualify the general force of the word 'demisi,' for otherwise the particular covenant would be in vain, if the force of this word 'demisi,' should stand; and also

these words 'demisi et concessi' are frequent in every ordinary lease that is made; and the best construction of deeds is to make one part of the deed expound the other, and so to make all the parts agree, et quoad fieri possit according to the true intent and meaning of the parties." In *Merrill* v. *Frame*, 4 Taunt. 329, the lease contained an express covenant for quiet enjoyment "without the lawful let, suit, or eviction, of the lessor, or any claiming or to claim by, from, or under him," and the lessee was evicted by a paramount title. In support of a declaration assigning the eviction as a breach, *Shepherd*, Serjeant, contended, "that, although under the express covenant for quiet enjoyment against the lessor and all claiming under him, the plaintiff could not recover upon an eviction by a paramount title, yet the latter covenant did not restrain or destroy the implied covenant for an absolute good title which was contained in the words 'demised and leased;' and he cited *Gainsford* v. *Griffith*, 1 Saund. 59, to shew that there might be a distinct general covenant, not restrained by the subsequent particular covenant." But the court expressed a decided opinion against the possibility of applying the doctrine to that case. Most of the cases cited on the part of the plaintiff are cases of express covenants. The cases upon this subject are very neatly put by Mr. Merrifield in his edition of Watkins on Conveyancing, 439.

COLTMAN, J.—There is a great difference between the covenant implied from the use of the word "demise," and an express covenant for good title. *Gainsford* v. *Griffith*, *Hesse* v. *Stevenson*, *Howell* v. *Richards*, *Barton* v. *Fitzgerald*, *Milner* v. *Horton*, and *Smith* v. *Compton*, were all cases of express covenants. Lord Hale also, in *Norman* v. *Foster*, 1 Mod. 101, is evidently speaking with reference to the case of an express covenant for title; and in that case I agree with the doctrine he lays down. It has been

1838.

LINE v. STEPHENSON.

said that the covenant for title might in this case have been pleaded, according to its legal effect, as an express covenant. But that is confounding a rule of pleading with a rule of evidence. In its natural sense, the word "demise" does not import a covenant for quiet enjoyment, but it has acquired this force by a rule of law very early established. And we have the high authority of Lord Coke for holding that the generality of the covenant in law is restrained and qualified by the subsequent express covenant. It would be extremely mischievous to unsettle the rule by the introduction of a novel distinction like that suggested. I cannot distinguish this case from that of *Merrill* v. *Frame*. There, there was the general covenant implied under the word "demise," and also a subsequent covenant for quiet enjoyment similar in its terms to the covenant in this case. No breach of the express covenant had been committed; but there had been an eviction by one claiming by title paramount. The only breach there contended for, was a breach of the covenant for good title implied under the word "demise:" and the question was whether the implied covenant was restrained by the express covenant. The court held that it was. Acting upon the authority of this, as well as upon that of *Nokes's* case, I think we are bound to hold that the defendants in this case are entitled to judgment. I have always considered this as one of the most settled points in the law.

Judgment for the defendants.

1838.

Tuesday, *June 5th.*

BOYD *v.* THE LONDON AND CROYDON RAILWAY COMPANY.

By a railway act, it was provided that no action should be brought against any *person* for any thing done or omitted to be done in pursuance of the act, or in the execution of its powers or authorities, unless twenty days' previous notice in writing should have been given by the party intending to commence and prosecute such action, to the intended *defendant*, &c.:—Held, that *the company* were included in the word "person," and entitled to notice of action, notwithstanding that, in numerous instances throughout the act, the terms "person" and "party" were used in opposition to "corporation."

THIS was an action on the case against the London and Croydon Railway Company for an alleged obstruction of a private carriage way.

At the trial before Tindal, C. J., at the last Assizes for the county of Surrey, it appeared that the way the obstruction of which was complained of, was part of the old towing path of the Croydon canal, the site of which had been purchased by the defendants for the formation of the railway; and that the way had been entirely destroyed. A verdict was taken for the plaintiff, subject to a motion for a nonsuit, if the court should be of opinion that the defendants were entitled to a notice of action pursuant to the 179th section of their act of incorporation, 5 & 6 Will. 4, c. x, which enacts "that no action, suit, or information, nor any other proceeding of what nature soever, shall be brought, commenced, or prosecuted against any *person* for any thing done or omitted to be done in pursuance of the act, or in the execution of the powers or authorities, or any of the orders made, given, or directed in, by, or under the act, unless twenty days' previous notice in writing shall be given by the party intending to commence and prosecute such action, suit, information, or other proceeding, to the intended defendant, nor unless such action, suit, information, or other proceeding, shall be brought or commenced within six calendar months next after the act committed, or, in case there shall be a continuation of damage, then within six calendar months next after the doing or committing such damage shall have ceased, nor unless such action, suit, or information shall be laid and brought in the county or place where the matter in dispute or cause of action shall arise; and the defendant in such action, suit, information, or other proceeding, may plead the general issue, and give the act and the special matter in evidence upon any

1838.

BOYD v. THE CROYDON RAILWAY CO.

trial to be had thereupon, and that the acts were done or omitted to be done in pursuance of or by the authority of the act."

Kennedy, in the last term, accordingly moved for a rule nisi.—The question is whether a corporation is included in the word "person" in the 179th section of this act. By the interpretation clause, s. 2, it is provided, "that, where in this act any words shall be used importing the singular number or the masculine gender only, such words shall be understood to include several matters as well as one matter, several persons as well as one person, and females as well as males; and where the word 'land' shall be used, the same shall be understood to include tenements, buildings, erections, and hereditaments; and where the word 'corporation' shall be used, the same shall be understood to mean any body politic, corporate, or collegiate, civil or ecclesiastical, aggregate or sole; unless in any of the cases aforesaid it be otherwise specially provided, or there be something in the subject or context repugnant to such construction." There may be clauses in the act in which the terms "person" and "corporation" are used in opposition: but there are also many where the latter must of necessity have been intended to be included in the former term; particularly sections 86, 155, 163, and 171. That the word "person" *may* include a corporation, is clear. In Co. Litt. 2. a., it is said that "persons capable of purchase are of two sorts, persons natural created of God, as J. S., J. N., &c., and persons incorporate or politique created by the policy of man (and therefore they are called bodies politique); and those be of two sorts, viz. either sole or aggregate of many." And the same is laid down in 1 Bl. Com. 123—"Persons are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us; artificial, are such as are created and devised by human laws for the purposes of society and government, which are

1838.

BOYD v. THE CROYDON RAILWAY CO.

called corporations or bodies politic." And in p. 467, are passages to the same effect. The statute of mortmain, 7 Ed. 1, st. 2, provided and ordained "quod *nullus religiosus aut alius quicunque* (which Lord Coke, 1 Inst. 2. b., 2 Inst. 75, interprets, other whatsoever of like quality of being, a body politique or *corporate*, ecclesiastical or lay, sole or aggregate of many) terras aut tenementa aliqua emere vel vendere, aut sub colore donationis aut termini, vel alterius tituli cujuscunque ab aliquo recipere aut alio quovis modo arte vel ingenio sibi appropriare presumat, sub forisfactura eorumdem, per quod ad manum mortuam terre et tenementa hujusmodi deveniant quoquo modo. Providimus etiam, quod *si quis religiosus aut alius*, contra presens statutum aliquo modo arte vel ingenio venire presumpserit, liceat nobis et aliis immediatis capitalibus dominis feodi taliter alienati illud, infra annum a tempore alienationis hujusmodi, ingredi, et tenere in feodo et hereditate." The 21 Hen. 8, c. 13, s. 5, enacts that no "spiritual *person or persons*," secular or regular, of what estate or degree soever they be, shall from henceforth by himself nor by any other for him, nor to his use, bargain and buy to sell again for any luere, gain, or profit, in any markets, fairs, or other places, any manner of cattle, corn, &c., or any manner of victual or merchandize, what kind soever they be of, &c.: and s. 8 provides, that every other "spiritual *person or persons*," not having sufficient glebe or demesne lands in their own hands in the right of their churches, monasteries, and houses, for pasturage of cattle, or for increase of corn, to and for the only expenses of their householders, and for their carriages or journies, may take in ferm other lands, and buy and sell corn and cattle for the only manurance, tillage, and pasturage of such ferms &c.: and in both instances corporations have been held to be included in the term "person or persons." Again, the statute 22 Hen. 8, c. 5, imposes the burthen of repairing bridges and highways upon the *inhabitants* of

1838.

BOYD v. THE CROYDON RAILWAY CO.

the shire &c.: and in commenting upon this statute, Lord Coke says: "Every corporation and body politicke residing in any county, riding, city, or town corporate, or having lands or tenements in any shire, riding, city, or town corporate, quæ propriis manibus et sumptibus possident et habent, are said to be inhabitants there within the purview of this statute." In *Fisher* v. *The Thames Junction Railway Company*, 5 Dowl. 773, which was an action on the case for an injury done to the plaintiff's reversionary interest, the defendants were desirous of pleading the general issue, and also pleas denying the plaintiff to be possessed of the reversion, and that the person stated to be tenant in the declaration was not tenant; it appearing that the defendants were a company incorporated by act of parliament, which enabled them to plead the general issue and give in evidence that the act complained of was done in pursuance of the authority of the act—the court refused to allow the other pleas together with the general issue. The limitation and interpretation clauses in that act are the same in effect as those in the act now under consideration. In deciding as they did, the court of Exchequer must have assumed that the company were comprehended within the term "persons." And in *Wilkes* v. *The Hungerford Market Company*, 2 Scott, 446, 2 New Cases, 281, although the necessity of a notice of action was canvassed at great length, it was never suggested either at the bar or by the court that such an objection as this could be sustained.

Platt and *Channell*, now shewed cause.—No notice of action was necessary in this case. The passages cited from Lord Coke, from Blackstone, and from the statutes of mortmain, of bridges, and for the regulation of clerical persons, do not warrant the construction contended for: in all of them the persons spoken of are designated as corporate, spiritual, religious, or artificial, as contradis-

1838.

BOYD v. THE CROYDON RAILWAY CO.

tinguished from natural persons. All acts of parliament that are in restraint or derogation of the common law right of the subject are to receive a strict construction—Per Lord Eldon, in *Ash* v. *Abdy*, 3 Swanst. 664. The statute of mortmain is directed against both buyer and seller; the latter may be an ordinary person, the former a corporation. In no case has the word "person," standing alone, ever been held to include a corporation. Then, is there anything in this act of parliament to shew that the legislature in the clause in question intended the company to be included in the term "person"? In section 155 (one of those relied on by the defendants), the acts that are prohibited are only such as could be done by individuals, and penalties are imposed, with power of imprisonment in the event of their not being paid: that section therefore could hardly apply to the corporation. Three descriptions of persons are adopted in the act—"persons," "parties," and "corporations:" and there are very many clauses evidently shewing that "person" and "party" are used advisedly to mean persona individua, and that, where corporations are intended, such intention is plainly expressed. Such is the inference to be drawn from a comparison of the language used in sections 1, 3, 8, 26, 32, 34, 35, 36, 39, 40, 41, 43, 53, 56, 62, 65, 86, 109, 111, 112, 120, 121, 123, 125, 134, 135, 150, 155, 159, 162, 163, 171, 173, 174, 191, 193, 197, 200. The legislature has clearly by the interpretation clause limited the meaning of the word "person" to the subordinate agents of the company. In the corresponding clause of the Brighton Railway act, 1 Vict. c. cxix, the words are—"No action &c. shall be brought against any person *or corporation*, for anything done or omitted to be done" &c.—the very words which, if inserted here, would have rendered discussion unnecessary. In *Scales* v. *Pickering*, 1 M. & P. 195, 4 Bing. 448, Best, C. J., says: "If the words of the act be ambiguous or doubtful, every presumption must be

1838.

BOYD
v.
THE CROYDON RAILWAY CO.

made against the powers of the company, and in favour of individuals." Wherever the legislature have intended the word "person" to have so large and comprehensive a meaning as is here contended for, they have expressed their intention in apt and clear language. Thus, in the 3 & 4 Will. 4, c. 27, s. 1, and c. 74, s. 1, it is declared that "the word 'person' shall extend to a body politic, corporate, or collegiate, as well as an individual." And in the tithe commutation act, 6 & 7 Will. 4, c. 71, s. 12, it is enacted "that, in the construction and for the purposes of that act, unless there be something in the subject or context repugnant to such construction, the word 'person' shall mean and include the king's majesty, and any body corporate, aggregate or sole, as well as an individual."

Wilde, Serjeant, and *Kennedy*, in support of the rule, were stopped by the court.

TINDAL, C. J.—It appears to me that the company who are defendants in this action are within the protection of the 179th section of this act. It is perfectly clear that in very many of the clauses that have been referred to, the word "person" could by no possibility have been intended to include the company; for instance, where the directors or other common individuals are spoken of, or where the word "persons" or "parties" is put in opposition to "corporations." But it is equally clear, and indeed it is conceded, on the part of the plaintiff, that "corporations" *may* be included in the words "persons" or "parties." The question is, whether or not the word "person" in the 179th section is used in a qualified sense. It is to be observed that it is not a clause requiring anything to be done by the company. The interpretation clause professes to explain the sense in which particular words are used; but it does not necessarily follow that those words are to receive the same construction throughout the act.

1838.

BOYD v. THE CROYDON RAILWAY CO.

I cannot read the 179th section without coming to the conclusion that it was intended to embrace *any* defendant. It enacts "that no action, suit, or information, nor any other proceeding, of what nature soever, shall be brought, commenced, or prosecuted against any *person*, for anything done or omitted to be done in pursuance of this act, or in the execution of the powers or authorities, or any of the orders made, given, or directed, in, by, or under this act, unless twenty days' previous notice in writing shall be given by the *party* (dropping the word first used) intending to commence and prosecute such action, suit, information, or other proceeding, to the intended *defendant*," &c.; and so it goes on to the end using the general term "defendant." I am clearly of opinion that the company fall within this description. The section which follows, viz. the 180th, is even stronger: it enacts "that no plaintiff shall recover in any action for any irregularity, trespass, or other wrongful proceeding done or committed in the execution of this act, or in, under, or by virtue of any power or authority hereby given, if tender of sufficient amends shall have been made by or on behalf of the *party* who shall have committed such irregularity, trespass or other wrongful proceeding, before such action brought; and in case no tender shall have been made, it shall be lawful for the defendant in any such action, by leave of the court where such action shall depend, at any time before issue joined, to pay into court such sum of money as he shall think fit; whereupon such proceedings, order, and adjudication shall be had and made in and by such court, as in other actions where defendants are allowed to pay money into court." By the 1st section of the act the company are made capable of being sued: and it is impossible not to see, that, if they are excluded from the benefit of the 179th section, the very parties most standing in need of protection, and about whose purpose and situation the plaintiff could have no doubt, would

1838.

BOYD v. THE CROYDON RAILWAY CO.

be deprived of it. If the action is brought against an individual, the plaintiff may reasonably entertain doubt as to whether or not the act he complains of is within the protection of the statute; but there could be none when he brings his action against the company. Without impugning any of the arguments urged before us as to the common law meaning of the word "person," I think we should not be giving effect to the intention of the legislature, unless we held the company to be comprehended within that term in the clause more immediately in question. I therefore think the rule for entering a nonsuit must be made absolute.

PARK, J.—I am of the same opinion. It does not follow, that, because in this act of parliament the words "person" and "party" are sometimes so used that they can only intend individuals, the same limited construction is to be applied throughout the whole act.

VAUGHAN, J.—It is not surprising that in an act of parliament of such enormous length, the same words should sometimes be used in different senses. Looking at the object of the act, it is impossible to conceive that the legislature did not intend to include the company in the protecting clauses. Striking out of the 179th section the words "against any person" (and the clause would read as well, and be equally effective without them), there could not be a doubt as to the intention of the act. The use of the word "defendant" throughout the remainder of the clause materially tends to the same conclusion.

COLTMAN, J.—In construing an act of parliament, whether public general, or of the nature of the act now under consideration, we are bound to ascertain as far as we can what was the intention of the legislature, and, if the language used be sufficient, to give effect to such intention. The interpretration clause, the object of which in an act of parliament is to aid the construction, is wholly affirm-

1838.

BOYD v. THE CROYDON RAILWAY CO.

ative in its nature. We must give effect to the words used to the full extent of that clause: but it does not follow that the language of the act is to be *restrained* by the interpretation clause, and deprived of their natural and usual signification, where they are obviously so used by the legislature. It is obvious here that the act intended to give full protection to the company. In the absence of an interpretation clause, I should feel no difficulty in holding that the company *might* be included in the term "person:" and I see no reason why the introduction of that clause should narrow the construction. Upon the whole I think we do no violence to the language of the act, but, on the contrary, do but carry into effect the intention of the legislature, when we hold that the present defendants are within the protection of the 179th section, and therefore entitled to notice.

Rule absolute (28).

(28) See Cortis v. The Kent Water Works Company, 7 B. & C. 314, a decision to the same effect.

SIMPSON *v.* Sir W. R. CLAYTON, Bart.

Wednesday, June 13th.

Lands held under letters patent from the Duchy of Cornwall for a term determinable on the deaths of three parties named therein, were leased for 65¼ years if the cestui que vies should so long live, with a covenant on the part of the lessor, his executors, &c., in case of the death of those parties during the term by the indenture granted, to "apply for, and do his and their utmost endeavours to procure a renewal or renewals of such letters patent for another life or lives, so as the lessees, their executors, &c., might hold and enjoy the premises for the whole term, subject only to the rents and covenants in the indenture mentioned, and without being compelled or compellable or liable to pay any part of the fine or fines that should be paid on such renewal." Two of the lives having dropped, the grantee of the letters patent applied for a renewal. The Duchy demanded for such renewal a fine which was found by a special verdict to have been a reasonable fine, if such fine ought to be calculated on the annual value of the premises taken at rack rent—two and a half and three years' value:—Held, that this was a proper mode of valuation, and the fine not unreasonable; and that the lessor, having declined to pay such fine, had failed to perform his covenant to do his utmost endeavours to procure a renewal of the letters patent.

Held also, that the above was a covenant running with the land.

And that the fact of the plaintiff being assignee only of a part of the interest created by the lease, did not preclude him from suing for and recovering damages in respect of the breach of covenant.

THIS was an action of covenant brought by the plaintiff, who claimed as assignee of five sixths of the interest

1838.

SIMPSON v. CLAYTON.

of the original lessees, against the defendant, as assignee of the lessor.

The declaration stated that Sir W. Clayton, being possessed of the tenements and premises hereinafter mentioned to have been demised, for the residue and remainder of a certain term of years, to wit, the residue of a term of ninety-nine years, commencing from the 5th March, 1777, theretofore granted of the said premises (inter alia) under and by virtue of certain letters patent under the great seal of the Duchy of Cornwall, if three persons, viz. the said Sir W. Clayton, George Clayton, and James Medwin, the lives nominated in the said letters patent, should so long live, by indenture of the 1st August, 1789, demised them to John Ismay and John Harrison for sixty-five years and one quarter, if Sir W. Clayton, George Clayton, and James Medwin, should so long live, and covenanted that he, Sir W. Clayton, his executors, administrators, and assigns, and all other persons who for the time being should be entitled to the said letters patent and the premises thereby demised, in order to confirm the said term thereby granted in the said premises to Ismay and Harrison, their executors, administrators, and assigns, absolutely, should and would from time to time, when either of them, the said Sir W. Clayton, George Clayton, and James Medwin, or any other person or persons whose life or lives should be nominated and appointed in any future letters patent in his or their place or stead, should happen to die or depart this life during the said term of sixty-five years and one quarter of a year, *apply for, and do his and their utmost endeavours to procure a* renewal or renewals of such *letters patent for another life or lives;* so as the said John Ismay and John Harrison, their executors, administrators, and assigns, might hold and enjoy all and singular the premises thereby demised to them for the whole of the said term of sixty-five years and one quarter of a year thereby demised, subject only to the rents and covenants

Covenant by the lessor, his executors &c., to apply for, and do his and their utmost endeavours to procure a renewal of the letters patent.

in the indenture mentioned, and without the said John Ismay and John Harrison, their executors, administrators, and assigns being compelled or compellable or liable to pay any part of the fine or fines that should be paid on such renewal; and also that they, the said John Ismay and John Harrison, their executors, administrators, or assigns, paying the said yearly rent, and performing, fulfilling, and keeping all and singular the covenants, clauses, and agreements thereinbefore reserved and contained on the parts and behalfs of them the said Ismay and Harrison, their executors, administrators, or assigns to be paid, observed, performed, and kept, should and might peaceably and quietly have, hold, use, occupy, possess, and enjoy all and singular the premises thereby demised, or intended so to be, with their and every of their appurtenances, for and during the term thereby granted, without any let, suit, trouble, denial, interruption, ejection, eviction, or molestation of, from, or by the said W. Clayton, his executors, administrators, or assigns, or the person or persons who for the time being should be entitled to the said letters patent, or any other person or persons whomsoever lawfully claiming or to claim by, from, or under, or in trust for him, them, or any of them, or by or through his, their, or any or either of their consent, assent, neglect, default, privity, or procurement; as by the said indenture, on reference thereto, will appear: by virtue of which demise the said Ismay and Harrison, to wit, on the 1st August, 1789, entered into and upon all and singular the said demised premises, with the appurtenances, and became and were possessed thereof for the said term so to them thereof granted as aforesaid. The declaration then proceeded to set forth various mesne assignments and demises, by virtue whereof the plaintiff ultimately became assignee of three fourths and one third of another fourth [five sixths] of and in the demised premises for the rest and residue of the said term of sixty-five years and a quar-

Covenant for quiet enjoyment during the term.

Averment that Ismay and Harrison entered and became possessed;

and that, after various mesne assignments, the premises became vested in the plaintiff to a certain extent.

1838.

SIMPSON v. CLAYTON.

ter by the said first mentioned indenture granted; and that during that term, to wit, on the 11th October, 1828, George Clayton, one of the persons so named in the said letters patent from the Duchy of Cornwall, and in the said first-mentioned indenture mentioned, died; and afterwards and during the said term by the said first-mentioned indenture granted, to wit, on the 30th November, 1833, James Medwin, another of the persons so named in the said letters patent and in the first-mentioned indenture, died; and afterwards, and during the said term by the first-mentioned indenture granted, to wit, on the 28th January, 1834, Sir W. Clayton, in the said first-mentioned indenture mentioned, and being the said party thereto, died: that no other person or persons were during any part of the time aforesaid, either before or after the making of the said first-mentioned indenture until the death of the said Sir W. Clayton, nominated and appointed in any letters patent from the Duchy of Cornwall of the said demised premises in the place or places or stead of the said G. Clayton, J. Medwin, or either of them, according to the meaning and intent of the said first-mentioned indenture: and, although the plaintiff had performed all things in the said first-mentioned indenture mentioned on his part and behalf as such assignee as aforesaid to be performed and fulfilled; yet the said Sir W. Clayton in his lifetime, not regarding his said covenant in that behalf so made as aforesaid, did not nor would either on the death of the said G. Clayton or the said J. Medwin, in order to confirm the said term by the said first-mentioned indenture granted in the said premises to Ismay and Harrison absolutely, *apply for and do his utmost endeavours to procure a renewal of the said letters patent in the said first-mentioned indenture mentioned for another life or lives*, so as the plaintiff might hold and enjoy the said demised premises in and by the said first-mentioned indenture demised to him for the whole of the said term of 65¼ years,

Death of George Clayton, the first life.

Death of James Medwin, the second life.

Death of Sir W. Clayton, the third life.

Averment that no other person or persons was or were nominated in the place of G. Clayton, &c.

Performance by plaintiff.

Breach—that the lessor did not apply for and do his utmost endeavours to procure a renewal of the letters patent.

subject only to the rents and covenants in the said indenture contained, but wholly neglected and refused so to do; that thereupon, and by reason thereof, and on the death of the said Sir W. Clayton, the said term by the said first-mentioned indenture granted ceased and became and was ended and determined: By means of which said several premises the plaintiff had lost and been deprived of all the rents, profits, benefits, and advantages which would have arisen and accrued to him from the performance of the said covenant of the said Sir W. Clayton in that behalf so made and so broken as aforesaid, and from the existence and continuance of the said term by the said first-mentioned indenture granted, and which rents &c. would have amounted to a large sum of money, to wit 10,000*l.*, and also by means of the premises the plaintiff had lost and been deprived of the use and benefit of divers sums, amounting, to wit, to 2,000*l.*, in and about the improving, repairing, and benefiting the said premises during the said term; and the plaintiff had been and was by means of the premises otherwise much injured and damnified: so the plaintiff in fact said that the said Sir W. Clayton had broken the covenant so by him made as aforesaid.

Special damage.

The defendant pleaded that the said Sir W. Clayton did, on the death of G. Clayton and J. Medwin respectively, in order to confirm the said term by the said first-mentioned indenture granted in the said premises to Ismay and Harrison absolutely, *apply for and do his utmost endeavours to procure a renewal of the said letters patent in the said first-mentioned indenture mentioned for another life or lives*, so as the plaintiff might hold and enjoy the said demised premises in and by the said first-mentioned indenture demised as aforesaid for the whole of the said term of 65½ years, subject only to the rents and covenants in the said indenture contained, according to the tenor and effect, true intent, and meaning of the said first-mentioned indenture, and of the said covenant of the

Plea, that the lessor did, on the death of G. Clayton and J. Medwin, apply for and do his utmost endeavours to procure a renewal of the letters patent.

1838.

SIMPSON v. CLAYTON.

said Sir W. Clayton by him in that behalf made as aforesaid.

Issue thereon.

Upon this plea the plaintiff joined issue.

At the trial the jury found a special verdict, by which it appeared, that, between the years 1671 and 1765, seven leases of the property in question had been successively granted by the Duchy of Cornwall to the Clayton family for terms not exceding thirty-one years—the first, for a fine of 288*l.*, and a rent of 50*l.*—the second, for a fine of 532*l.* 6*s.*, and a rent of 50*l.*—the third, for a fine of 350*l.*, and a rent of 16*l.* 10*s.* 9*d.* (the residue of the 50*l.* rent having been discharged for a fine of 234*l.* 4*s.*)—the fourth, for a fine of 354*l.*, and a rent of 16*l.* 10*s.* 9*d.*—the fifth and sixth for the same fine and rent—and the seventh, for a fine of 690*l.*, and a rent of 16*l.* 10*s.* 9*d.*

Private act.

In 1776, a private act was passed, intituled 'An act to enable W. Clayton, Esq., during his life, and the guardians of his infant children after his decease, to make building and improving leases of certain lands and premises, part of the manor of Kennington, in the county of Surrey, held by letters patent from his Majesty as part of the Duchy of Cornwall, and to raise money for payment of the fines and expenses of renewing the said letters patent, and for defraying the expenses to attend the granting building and improving leases;' by which—after reciting (among other things) that the said premises held under the afore-mentioned letters patent were then let to divers tenants at rack rents by and under leases for several terms of years, at several yearly rents, amounting in the whole to the yearly rent of 327*l.*; that other parts of the property were let to tenants at will at the yearly rent of 31*l.*; that it was apprehended and believed that many persons would be willing to enter into contracts for and take leases in possession or reversion of many parts of the said premises for the purposes of building or improvements, and would pay considerable improved yearly rents for the same;

1838.

SIMPSON v. CLAYTON.

that some of the tenants might be willing to surrender their then present lease or leases, upon reasonable satisfaction being made to them for the same, which would be amply compensated by the great increase of rent such building lease or leases would produce; that the said W. Clayton had applied to the lords of his majesty's treasury to accept of a surrender of the then present lease, and for the grant of a new lease for the term of ninety-nine years, determinable at the end of three lives, which their lordships had agreed to—it was, amongst other things, enacted that it should and might be lawful to and for the said W. Clayton the elder, and others specified in the act, from and after the obtaining the said letters patent or lease from his majesty for the term of ninety-nine years, determinable as aforesaid, from time to time to demise, lease, or grant, or to contract for the demising, leasing, or granting all or any part of the said premises unto any person or persons who should be willing to build upon or in any other manner improve the same, for any term or number of years, in possession or reversion, not exceeding ninety-nine years, to be computed from the 5th April, 1776, determinable on the dropping of such lives as should be mentioned and contained in the said letters patent or lease so intended to be granted; so as upon every such lease there should be reserved and made payable, during the continuance thereof, the best and most improved yearly rent or rents that could be reasonably had or obtained for the same; and so as no fine or income, or any thing in the nature of a fine or income, should be taken for the same; that it should and might be lawful to and for the said W. Clayton the elder to enter into a covenant or covenants in all or any of the lease or leases to be by him respectively granted by virtue of the said act, that he and all other persons claiming under him should and would from time to time, and as often as occasion should be or require, *apply for*, and, *in case the same could be obtained*

1838.

SIMPSON v. CLAYTON.

on reasonable terms, procure such a renewal or renewals of the said lease or letters patent as should from time to time enable him or them to complete and make up the full term and terms for years which should be so granted or be contracted to be granted; and that, when and so often as the said premises should be renewed by the said W. Clayton the elder, or by any person or persons claiming under him, he the said W. Clayton the elder, or such other person or persons who for the time being should procure such renewal of the said lease or letters patent, should and would, upon the request of any person or persons who for the time being should be entitled to the term or terms of years then subsisting in such lease or leases as should be so granted by the said W. Clayton the elder, grant to him or them such further or other lease or leases, term or terms of years, of and in the respective premises so leased by the said W. Clayton the elder, as would from time to time make up his, her, or their term or number of years, the full and complete term or number of years which in and by such original lease or leases so to be granted by the said W. Clayton the elder, should be or should be agreed to be granted; so as the person or persons requesting such further lease or leases should pay unto the person or persons who should have procured such renewed lease or letters patent as aforesaid, such sum or sums of money as should be an equal share of the fine or fees which should have been paid for procuring such renewed lease or letters patent, in such proportion as the annual rent of the premises to be comprised in such further lease or leases should bear to the annual rent of the whole of the said premises to be comprised in such renewed lease or letters patent; save and except as to such fines and fees as should be paid for any renewal or renewals of the said lease or letters patent which should be procured within the last twenty years of such term or terms as should be granted or be contracted to be granted

1838.

SIMPSON v. CLAYTON.

by the said W. Clayton the elder: with power to W. Clayton the elder to borrow money on mortgage to reimburse the said W. Clayton the elder, his executors or administrators, so much money as he or they should pay or lay out for the fine or fees to be paid for granting or renewing the said thereinbefore mentioned lease or letters patent from his majesty.

Letters patent of March 1777.

By letters patent of the 5th March, 1777, in consideration of the surrender of the former letters patent, and of a fine of 468*l.*, and a rent of 16*l.* 10*s.* 9*d.*, the officers of the crown, during the minority of the Prince of Wales, demised and granted the premises to trustees for the Clayton family for ninety-nine years, if W. Clayton, George Clayton, and James Medwin, should so long live.

The value of the interest surrendered by W. Clayton as part of the consideration for the granting of the new letters patent was, in the then present money, equal in value to a sum of 1006*l.* 18*s.* payable nineteen years thereafter, that is to say, at the expiration of the term surrendered by W. Clayton as aforesaid.

The grant of the last-mentioned letters patent was not made dispunishable of waste; and by the same there was reserved the antient and most usual rent for the premises, payable in manner and form as by the above-mentioned act of parliament was in that behalf required.

Several leases granted by Sir W. Clayton.

Divers demises and leases, in all twenty-five in number —one of the leases having been made by the said W. Clayton in the act of parliament mentioned, in pursuance of the power and authority thereby given him, and containing the covenant on the part of the lessor to apply for a renewal, and on the part of the lessee to contribute to the fine to be paid on such renewal, as in the act mentioned; and the remaining twenty-four of the said leases (including therein the lease to Ismay and Harrison in the declaration mentioned,) having been made by Sir W. Clayton, Bart., after he became entitled to the rents and pro-

1838.

SIMPSON v. CLAYTON.

fits of the estate and premises as aforesaid; and each of the leases being a demise or lease of a certain part of the premises mentioned and comprised in the letters patent, for a term of years therein mentioned, determinable as therein mentioned—were duly granted; and by the several leases aforesaid the whole of the premises mentioned and comprised in the letters patent were demised and leased.

The terms created by the said leases were long terms of years, viz. one for 97¾ years, one for 84 years, one for 73 years, one for 69¾ years, one for 69 years, one for 65¼ years, ten for 65 years, one for 64½ years, one for 61¾ years, one for 61 years, four for 58 years, and one for 24 years; and were, with the exception of the last mentioned, subject to be determined by the death of W. Clayton, G. Clayton, and J. Medwin in the declaration mentioned. At the time of this action only one of the terms for which the leases were granted, viz. the said term of twenty-four years, had expired or run out by effluxion of time, or had ceased or determined otherwise than by the deaths of the three before named parties; and, but for the same deaths, the terms so granted, except as aforesaid, would have continued for many years.

Rental received by Sir W. Clayton.

The total amount of rent or income which, during the existence of the said terms of years, was or could be received by Sir W. Clayton from the premises comprised in the letters patent, was, the annual sum of 1238*l.* 7*s.* 6*d.*

Of the twenty-five leases, nine were granted previously to the lease to Ismay and Harrison, and fifteen subsequently thereto. Six of such leases were granted at pepper-corn rents; and in one other of the leases, comprising one sixth part of the whole premises demised by the letters patent, there was contained a covenant on the part of the lessee to pay an equal share of the fine and fees to be paid on any renewal of the said letters patent, in such proportion as the annual rent of the premises demised to such lessee bore to the annual rent of the whole

1838.

SIMPSON v. CLAYTON.

of the premises comprised in the letters patent; with a covenant on the part of such lessee to build seventy houses. In three other of the leases there was contained a covenant to contribute one twentieth part of the fine to be paid upon any renewal of the said letters patent. Eight of the leases prior in date to the lease to Ismay and Harrison were granted in consideration of contracts to cover the whole frontage of the land thereby demised with good and substantial messuages or dwelling-houses. The fifteen leases granted subsequently to the lease to Ismay and Harrison were granted in consideration of contracts to build one hundred and twenty-four houses.

Fines received by Sir W. Clayton.

On the 29th September 1791, Sir W. Clayton received a fine of 1200*l.* as the consideration for granting one of the leases; and on the 23rd September, 1802, a fine of 1400*l.* as the consideration for granting one other of the leases; such two last-mentioned leases being two of the leases above mentioned to have been granted at pepper-corn rents.

The plaintiff was in no wise party to or cognisant of any such leases, or the terms and conditions thereof, save the said lease in the declaration mentioned.

Grant of the lease in question.

Sir W. Clayton, on the 1st August, 1789, by an indenture of lease then made between him of the one part, and Ismay and Harrison of the other part, did demise, lease, and to farm let unto the said Ismay and Harrison, their heirs, executors, administrators, and assigns, certain pieces or parcels of land in the indenture and in the declaration particularly described, and on the terms and conditions in the declaration mentioned.

Term vested in the plaintiff.

By divers mesne conveyances and assurances, five sixth parts of the estate and interest of Ismay and Harrison in the premises demised under the said indenture of the 1st August, 1789, vested in the plaintiff.

Death of G. Clayton, one of the lives.

On the 11th October, 1828, George Clayton, one of the persons named in the letters patent, died.

1838.

SIMPSON v. CLAYTON.

Application by Sir W. Clayton for a renewal of the letters patent.

Fine demanded.

Steps subsequently taken by Sir W. Clayton.

Bill in Chancery.

On the 17th October, 1828, Sir W. Clayton applied to the crown, *with great urgency*, for a renewal: taking into account, however, the fines taken by himself in two instances, he offered less than three years' annual value of the premises, calculated according to the rents paid by his sub-lessees; and, after a protracted negotiation, the crown, in September, 1831, demanded a fine of 46,917*l.*, and a rent of 1000*l.* a year, or a fine of 63,210*l.* without a rent.

This demand was resisted as unreasonable. Two memorials were sent in by the sub-lessees, shewing the hardship of their case; and a fine of 30,000*l.* was offered by them. This being refused, Sir W. Clayton, in March, 1833, presented a petition of right; but, the Attorney-General objecting to that course of proceeding, and consenting to become a defendant in a bill in Chancery, a bill was filed in July, 1833, which alleged as a custom "that the manor of Kennington, with the demesne lands thereof, situate in or near the parish of Lambeth, in the county of Surrey, is parcel of the possessions of the Duchy of Cornwall, and such demesne lands are and have been usually granted or demised for terms of years at fixed annual rents, and such leases have been constantly renewed at fines, which have hitherto been assessed in a certain and established manner; that such grants or demises of the said demesne lands have been at all times made to a few persons only, who thereby become and are the chief or immediate tenants to the Duchy of Cornwall, but by whom the lands have been again usually demised or sublet in small portions to under-tenants; that large portions of such demesne lands, and particularly such parts thereof as are hereinbefore described, were originally of very little or no value, being marshy and wholly uncultivated, and requiring a great expenditure, to an amount exceeding the full value thereof, before the same could be made applicable to any useful purpose; that, in consequence thereof, and in order to promote the cultivation and draining and im-

provement of the said lands, and at the same time to provide for a just correspondent increase of the revenue of the said Duchy, a certain fixed tenure or mode of letting (the date and commencement of which are unknown) was introduced, and has been uniformly established and adhered to, whereby the said lands have been from time to time let to the tenants and their assigns at certain small fixed annual rents; and such leases or demises have been from time to time renewed on payment of reasonable fines ascertained by a certain fixed mode of calculation, which fines have in all cases never exceeded the amount of two years' gross, and, deducting one third for repairs and other outgoings, or what was deemed equivalent thereto, one and a half year's net value of the lands demised; and thus the tenants, having a certain established right, were encouraged to improve the said estates, and the Duchy derived the benefit thereof in the augmented fines of successive renewals; that, pursuant to such custom, portions of such demesne lands hereinafter described, have, from a period beyond memory, from time to time been granted and demised by the Duke of Cornwall for the time being to persons under whom the ancestors of the plaintiff derived title, and to the plaintiff and his ancestors, for terms of years; and that, in all such leases, a rent, then called and being an antient yearly rent, of 16*l.* 10*s.* 9*d.* has been constantly reserved and made payable; and such leases have, according to the custom, been renewable, and have in fact from time to time been renewed, in consideration of the payment at each renewal of a reasonable fine or premium, which has been uniformly calculated and assessed according to or in conformity with such established rule or standard as aforesaid."

The lords of the treasury filed their answer, but before the cause could be heard Sir W. Clayton died. A bill of revivor was filed by his administrator; and the said suit and the matters thereof were, on the 29th May, 1834, Answer.

1838.

SIMPSON v. CLAYTON.

brought before the court of Chancery for hearing and determination, by or on behalf of Sir William Robert Clayton, the defendant, upon a motion for an injunction to restrain the defendants in the said suit from granting leases of the said property which had been formerly held by Sir W. Clayton, and of which the premises demised by the indenture of the 1st August, 1789, formed part.

Bill dismissed.

On the 11th June, 1834, the then Lord Chancellor gave judgment in the matter of the said petition, against Sir W. Clayton's claim to a renewal of the letters patent, and dismissed the motion, but without costs.

Death of J. Medwin, the second life.

James Medwin, one of the persons named in the letters patent, died in July, 1833.

No other persons were, either before or after the making of the indenture of the 1st August, 1789, nominated or appointed in any letters patent granted from the Duchy of Cornwall, in the place or places or stead of George Clayton, James Medwin, or Sir W. Clayton, or either of them; and, upon the death of Sir W. Clayton, as hereinbefore mentioned, the terms respectively granted by the letters patent of the 5th March, 1777, and by the beforementioned indenture, ended and determined.

Death of W. Clayton, the third life.

All the various proceedings taken by Sir W. Clayton down to the time of the Lord Chancellor's judgment on the 11th June, 1834, were sanctioned by the plaintiff.

Value of the property at rack rent.

The annual rack rent value of the premises demised by the letters patent, was, at the time of the death of George Clayton, and in September, 1831, 21,095*l.*; and, if the fine so demanded by the Duchy of Cornwall for a renewal of the letters patent, ought to be calculated on the annual value of the premises taken at rack rent, the jury found that the fine demanded in September, 1831, was, on such calculation, a reasonable fine.

They also found, that one moiety of the rents received by Sir W. Clayton, annually laid by, would exceed the fine demanded by the Duchy of Cornwall at the time the

same was so demanded; and that the value of the fines of 1200*l.* and 1400*l.* paid to Sir W. Clayton as a consideration for the granting of two leases as aforesaid, would, at the like period, if they had accumulated at the rate of 4 per cent. per annum, amount to the sum of 9001*l.*

That Sir W. Clayton was always ready and willing to take, that he offered to his majesty's special commissioners for managing the affairs of the Duchy of Cornwall, to take, and that he used his best endeavours to obtain a renewal of the letters patent for another life or lives, upon the terms stated in the memorials presented, and in letters addressed to the officers of the Duchy, and in the bill filed in the court of Chancery on his behalf, and to pay for the same a fine to be estimated in any of the modes, or upon any of the principles, pointed out and stated on behalf of Sir W. Clayton in the said memorials and letters, or either of them, or in the bill in Chancery so filed as aforesaid.

Sir W. Clayton ready and willing &c.

That Sir W. Clayton did, on the death of George Clayton and James Medwin respectively, in order to confirm the term granted to Ismay and Harrison absolutely, *apply for and do his utmost endeavours to procure a renewal of the letters patent for another life and lives*, so that the plaintiff might have and enjoy the said demised premises for the whole of the said term of sixty-five years and one quarter, subject only to the rents and covenants in the indenture contained, according to the tenor and effect, true intent, and meaning of the said indenture and of the said covenant of Sir W. Clayton by him in that behalf made, *unless it was incumbent on him, in point of law, to pay the fine required by the Duchy*, or to do any other act or acts than those by the jurors above stated.

The case was argued in Easter Term last, by *Law*, for the plaintiff, and by *Platt*, for the defendant.

1838.

SIMPSON v. CLAYTON.

Law (*Wilde*, Serjeant, and *Shee* were with him), for the plaintiff.—The nature of the estate of the Duchy of Cornwall is fully discussed in *The Prince's* case, 8 Rep. 1. Since that time, and down to the year 1793 (which was after the grant of the lease from Sir W. Clayton to Ismay and Harrison), acts of parliament from time to time were passed to enable the person in possession of the Duchy to grant leases for thirty-one years or three lives. This power was by the 33 Geo. 3, c. 78, s. 3 (1793), extended to ninety-nine years.

As to the construction of the covenant.

The principal question between the parties on this special verdict, is, as to the true construction of the covenant in the lease of 1789, whereby the lessor, for himself, his executors, administrators, and assigns, covenanted, in case of the failure of any or either of the lives upon whose continuance the existence of the term was contingent, to "apply for and do his and their utmost endeavours to procure a renewal or renewals of the letters patent for another life or lives, so as the lessees, their executors, administrators, and assigns, might hold and enjoy all and singular the premises thereby demised to them, for the whole of the said term of 65¼ years thereby demised, subject only to the rents and covenants in the indenture mentioned, and without the lessees, their executors, administrators, and assigns, being compelled or compellable or liable to pay any part of the fine or fines that should be paid on such renewal." It is perfectly clear that it was in the contemplation of the parties that some fine would be payable by Sir W. Clayton on the renewal of the letters patent: the only question will be as to the proper mode of calculating the fine. It appears there were seven leases of the property in question at various times granted to the Clayton family: on each renewal there was a surrender of a portion of the unexpired term, and a fine was paid to the Duchy. Unlike the lord of a manor, the Duchy were not *bound* to grant a renewal:

1838.

SIMPSON v. CLAYTON.

but it appears that they consented to renew on payment of a fine which the jury have found to be a reasonable fine provided it was properly calculated upon the rack rental of the property, and not upon the mere interest which Sir W. Clayton derived from it. If Sir W. Clayton had dealt with the property in the manner pointed out by the private act of parliament, no difficulty could have arisen. Sir W. Clayton failed in the performance of his covenant to use his best endeavours to procure a renewal on the deaths of George Clayton and James Medwin respectively.

As to the construction of the covenant.

Platt, (*Channell* was with him), contra.—The plaintiff sues as assignee of five sixths of a term, against the personal representative of the party who created that term by a lease in which the lessor covenanted with the lessees, their executors, administrators, and assigns, in order to confirm the term thereby granted to them absolutely, when either of the lives should drop, to apply for, and do his utmost endeavours to procure a renewal or renewals of the letters patent under which he held the property from the Duchy, for another life or lives. The defendant in substance has pleaded that the lessor did so apply, and did use such endeavours. The questions, therefore, that present themselves for consideration are, first, whether or not that covenant has been broken, secondly, whether the plaintiff is entitled to maintain an action for damages by reason of that breach.

As to the mode of calculating the fine.

1. It appears from the documents set out upon the special verdict that the premises in question were parcel of a large quantity of waste land that had been granted by the Duchy to the Clayton family for many generations; such grants being from time to time renewed on payment of fines varying from 288*l.* to 690*l.*, and a nominal rent. It may be conceded that Sir W. Clayton was bound to pay a reasonable fine for the renewal of the letters patent on the

1838.

SIMPSON v. CLAYTON.

death of George Clayton and Medwin; but he was not bound to pay the enormous sum demanded by the Duchy. That fine was estimated at two and a half and three years' improved rental of the property, without any reference to the amount of the actual benefit derived from the grant by Sir W. Clayton. From the beginning to the end of the proceedings, it does not appear that the present plaintiff ever required Sir W. Clayton to pay the fine demanded, or ever asserted his right to compel him to effect a renewal at all events: but, on the contrary, down to the expiration of the last life, he sanctioned and was party to all the proceedings taken by Sir W. Clayton in resisting the exorbitant and oppressive demand of the Duchy. The question upon the covenant was almost totally one of fact—whether or not Sir W. Clayton did apply for and do his utmost endeavours to procure a renewal of the letters patent: and the jury found that he did, unless he was under a legal obligation to do something more.

Covenant not one running with the land, nor capable of being enforced by the assignee of a portion only of the interest.

2. Can the present plaintiff maintain this action? Is this a covenant running with the land? It is not a covenant to renew, or to repair, or for further assurance; but a covenant to apply for and endeavour to obtain something. Can this be more than a collateral covenant? [*Tindal*, C. J.—It begins with these words—" in order to confirm the said term hereby granted:" that looks very much like a covenant to renew.] Supposing it amounts to a covenant to renew (29), how is it to be carried into effect? The plaintiff is assignee of five sixths of the term, and requires a renewal; suppose the owner of the other sixth is not disposed to accept a renewal as to his share, what is the lessor to do? In Comyns's Digest, *Condition* (O. 2), it is said that " an assignee of part of a reversion shall not take advantage of a condition; as, if a lease be of three acres upon condition, the assignee of the reversion of two

(29) See Watkins on Conveyancing, 463; Smith's Leading Cases, 29; Spencer's case, 5 Rep. 16. a.

1838.

SIMPSON v. CLAYTON.

acres shall not enter if the condition be broken; for, the condition, being entire, cannot be apportioned by the act of the parties, but shall be destroyed." A covenant to renew clearly cannot be divisible, though a covenant to repair may be. All the parties in interest, therefore, ought to have joined in bringing the action. In *The Mayor of Congleton* v. *Pattison*, 10 East, 130, in a lease of ground, with liberty to make a watercourse and erect a mill, the lessee covenanted, for himself, his executors, administrators, and *assigns*, not to hire persons to work in the mill who were settled in other parishes, without a parish certificate: and it was held that this covenant did not run with the land, or bind the assignee of the lessee.

As to the mode of calculating the fine.

Law, in reply.—The improved value of the premises was the proper basis upon which to calculate the fine. In this respect the present case differs nothing from the case of a fine payable on admission to a copyhold. In *Halton* v. *Hassell*, 2 Str. 1042, Lord Hardwicke was of opinion "that the fine should be set according to the present improved value, which is all the lord has to look after; and if it was otherwise, this might open a door to defeat the lord in a great measure."

Covenant runs with the land.

The covenant in question is in the nature of a covenant to renew, and to support and confirm the term; and, by analogy to all the cases as to covenants running with the land, creates such an interest as to entitle the plaintiff to maintain this action—Moore, *Condition*, 159; *Spencer's* Case, 5 Rep. 16 a.; Shep. Touch. 176; *Isteed* v. *Stonely*, Anderson, 82; *Bally* v. *Wells*, Wilmot's Notes, 345, 3 Wils. 25; *Hyde* v. *Skinner*, 2 P. Wms. 196; *Roe* d. *Bamford* v. *Hayley*, 12 East, 464; *Vyvyan* v. *Arthur*, 2 D. & R. 670, 1 B. & C. 410; *Sampson* v. *Easterby*, 9 B. & C. 505, 4 M. & R. 422; *Easterby* v. *Sampson*, 6 Bing. 644, 4 M. & P. 601, 1 C. & J. 105. In *Roe* d. *Bamford* v. *Hayley*, where the lease (for twenty-one years) contained a

1828.

Simpson v. Clayton.

proviso, that, if either of the parties should be desirous of determining it at the end of seven or fourteen years, it should be lawful for either of them, his executors or administrators, so to do, upon giving twelve months' notice —Lord Ellenborough said: "The intention was not to give a collateral power, to be exercised by a stranger, but to annex certain privileges to the term and to the reversion, to pass with such term and with such reversion respectively, and to be exercised by the persons, whosoever they might be, to whom such term or reversion should come. The right respects the interest demised; and, according to the rules which ascertain whether a covenant is to be deemed to run with the land or not, would be considered as annexed to the reversion on the one hand and to the term on the other. A covenant by a lessor that he would renew at the end of his term has been adjudged to run with the land, and to bind the grantee of the reversion; and there is no substantial difference in point of construction between a stipulation for extending the term and a stipulation for shortening it." It is perfectly clear, therefore, that the covenant in question is one for the breach of which an action might be brought by an assignee of the entirety: and there is no reason why an action might not equally be brought by an assignee of a part, or of a partial interest in the whole, in respect of his interest. "A man being lessee of two houses and lands, covenants for him and his assigns to repair the houses; lessee assigns one of the houses and parcel of the land to J. S.; and the lessor for not repairing the house assigned to J. S. brought an action of covenant against J. S.; and adjudged that the action lies; for, this is a covenant which runs with the term assigned; and, although he be assignee of *parcel*, yet covenant lies against him for not repairing the said parcel; and thereupon judgment was given for the plaintiff"—W. Jones, 245, pl. 3. In *Twynam* v. *Pickard*, 2 B. & A. 105, it was held that covenant

Covenant divisible.

1838.

SIMPSON v. CLAYTON.

will lie by the assignee of the reversion of *part* of the premises demised, against the lessee, for not repairing. The difficulty suggested on the other side has no foundation; for, the lessee has no option; he is bound to accept the renewal. The covenant is divisible, *Gamon* v. *Vernon*, 2 Lev. 231, *Congham* v. *King*, Cro. Car. 221, *Stevenson* v. *Lambard*, 2 East, 575. It was not necessary that the owner of the remaining sixth should join in the action, though possibly they *might* have joined: at all events, the objection, if tenable, is properly the subject of a plea in abatement—*Hare* v. *Cator*, Cowp. 766; *Merceron* v. *Dowson*, 5 B. & C. 479, 8 D. & R. 264. No difficulty can arise as to the assessing or apportioning the damages the plaintiff has sustained, for the jury have already ascertained them.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—

The special verdict in this case has been found in an action of covenant brought by the plaintiff, who claims as assignee of five sixths of the interest of the original lessees, against the defendant as assignee of the lessor. It appears upon the record that the lessor, William Clayton, Esq., afterwards Sir William Clayton, Bart., at the time of granting the lease, held the premises in question (inter alia) by letters patent under the great seal of the Duchy of Cornwall for the residue of a term of ninety-nine years, if he, the said Sir William Clayton, George Clayton, his brother, and James Medwin, should so long live; and that the said Sir William Clayton, by indenture of lease, dated the 1st August, 1789, demised two parcels of land therein described, being parcel of the premises comprised in the Duchy lease, to John Ismay and John Harrison, to hold to them, their heirs, executors, administrators, and assigns, for sixty-five years and one quarter of a year from

1838.

SIMPSON v. CLAYTON.

the 24th June last preceding, if the three persons named in the said letters patent, or if any other person or persons who should be nominated (in manner therein provided) in any future letters patent of the said premises should so long live. And, after setting out the covenant by the lessor as to procuring a renewal of the letters patent when any of the lives should fall in, upon which the breach is afterwards assigned, and also a covenant for quiet enjoyment, it appears by the record that the precise issue raised for the determination of the jury was this—

Issue.

whether the said Sir William Clayton, the lessor, did, on the death of George Clayton and James Medwin respectively, in order to confirm the said term granted to Ismay and Harrison absolutely, apply for and do his utmost endeavours to procure a renewal of the said letters patent for another life and lives, so as that the lessees, their executors, administrators, or assigns might hold and enjoy the said demised premises for the whole of the said term of sixty-five years and one quarter of a year, subject only to the rent and covenants in the indenture of demise contained.

The main question therefore between the parties turns upon the proper sense and meaning of the covenant; for, when the intention of the contracting parties is once ascertained from the covenant itself, it is not difficult to decide whether the facts found by the jury upon the special verdict amount to a performance thereof or not.

As to the construction of the covenant.

The lessor covenanted that he would, when either of the cestui qui vies happened to die or depart this life during the term of sixty-five years and a quarter, "apply for and do his utmost endeavour to procure a renewal of the letters patent for another life or lives." There can be no difficulty in construing the meaning of the former part of the covenant, viz. "that the lessor should *apply for* a renewal of the letters patent;" and there can be as little difficulty in arriving at the conclusion, upon the facts

found, that the lessor did fully satisfy and perform this, the first part of the covenant, when the life of George Clayton fell in, by making application for the renewal in the proper quarter, repeating his application with great urgency, and pressing it by every means in his power. This appears both from the facts found by the jury, and also from the various documents set forth in the special verdict, perhaps at greater length and with more of prolixity than was absolutely necessary for the establishment of that point.

But the more difficult question remains, namely, what construction is to be put upon the latter branch of the covenant—" that he would *do his utmost endeavours* to procure a renewal of the letters patent." That the parties did not mean that the lessor should bind himself to procure a renewal, absolutely, and at all events, is evident from the very words of the covenant. The subject-matter of the covenant leads also to the same conclusion. The lessor could not compel the Duchy of Cornwall to renew any life or lives as they fell in. The Duchy was not compellable to renew, either by statutory obligation, any prescriptive liability, or any covenant. So far as appears upon the special verdict, the renewal was a matter of compact and agreement only. The fact found, that, in four out of the seven instances of letters patent granted to the family of Sir William Clayton, and set out in the special verdict, the fine paid upon the renewal of each, was of very different amount, affords the strongest proof that such amount was matter of compact and agreement, and nothing else. When, therefore, the lessor covenanted " that he would do his utmost endeavours to procure a renewal for another life," the necessary intendment is, that he covenanted to do everything that was known to be usual, necessary, and proper for the insuring the success of his endeavours; of which, as it appears to us, the very first step was, to bargain with the Duchy for such a fine as would induce them

1838.

SIMPSON v. CLAYTON.

to renew, and to pay such fine. Sir William Clayton had himself paid a fine on the granting of the letters patent under which he then held; and all his predecessors had done the same as they renewed in succession. It could not, therefore, but have been known to him that doing his utmost endeavours must necessarily have comprised the payment of *some* fine to the Duchy. And any doubt upon such interpretation of the covenant under consideration must be removed by the concluding terms of the covenant itself; for, the covenant goes on thus—" without the said lessees being compelled or compellable or liable to pay any part of the fine or fines that should be paid on such renewal;" words which we consider to be capable of only one interpretation, viz. that both the lessor and the lessees understood that *some* fine was to be paid on renewal of the letters patent, but that it was agreed between them that the whole of such fine, whatever might be its amount, should be borne by the lessor alone.

Now, if the performance of the covenant had become impossible by reason of the absolute refusal of the Duchy to renew on any terms whatever, no doubt the defendant would have excused himself from any breach, by shewing that he had used his utmost endeavours, though ineffectually, to procure the renewal; for, *that* was all he had covenanted to do. Or, again, if the officers of the Duchy had refused to renew, except upon the payment of an extravagant and unreasonable fine in proportion to the value of the property, there seems little doubt but that such a refusal on their part would have equally excused the covenantor, as amounting in effect to an absolute refusal to renew: for, the covenant must have a reasonable construction; and it never could have been intended by the contracting parties, that, by doing his utmost endeavours, he was called upon to do more than to pay a reasonable fine; that is, the fair and marketable price, according to the actual value of the estate at the time when it became necessary to put in a new life.

1838.

SIMPSON v. CLAYTON.

We therefore think that the whole of the inquiry as to the breach of the covenant having been incurred or not, is narrowed to this single point—whether it appears, upon the facts found, that Sir William Clayton has been ready to pay to the Duchy a reasonable fine for putting in a new life; which is, in effect, the same question as that contained in the concluding words of the special verdict—"whether it was incumbent on him in point of law to pay the fine required by the Duchy."

As to the mode of calculating the fine.

Now, the special verdict finds in terms that the fine demanded by the Duchy of Cornwall for the renewal of the letters patent upon the death of the said George Clayton was a reasonable fine, if such fine ought to be calculated on the annual value of the premises, taken at rack rent. And, if it is to be considered as a question of law whether the fine demanded was reasonable or not, we have no difficulty in saying, that, in our judgment, a fine which falls short in amount of three years' annual value of the premises cannot, upon any principle of law, or analogy to cases which have any bearing upon the subject-matter of inquiry, be deemed unreasonable. But the question still arises—and it is that upon which considerable argument has been raised—whether the Duchy can calculate the amount of their fine, not by reference to the rent paid by the lessee, but upon the rack rent of the houses which is paid by the tenants in actual occupation. Now, in the first place, we see no rule of law, nor has any such been pointed out to us, by which the Duchy is called upon to look to any other value of the premises, at the time when they are contracting for the renewal of the letters patent, than the actual value of the premises at that time, at the rack rent. If the premises, instead of being demised to sub-lessees, had been built upon and improved by the immediate lessee of the Duchy at his own expense, there could have existed no better criterion or test of the the real annual value of the premises than the rent actu-

1838.

SIMPSON v. CLAYTON.

ally received by the lessee from the tenants in possession of the houses built by himself on the land. And the right of the Duchy to assess and claim a particular amount of fine upon renewal, appears to us to be precisely the same whether the improvements have taken place by the act and at the expense of the lessee, or at the expense of others to whom such lessee has sub-demised the land. There is no privity between the Duchy and the sub-lessee: the Duchy is not bound to take notice that there is any sub-lease in existence; all that must necessarily come to the knowledge of the Duchy, is, the annual value of the land at the time when the renewal is required. But, in the second place, the point now under consideration bears a very close analogy to that of a fine claimed by the lord of a manor, upon the admission of a new tenant to a copyhold, where the estate has been improved during the continuance of an old lease granted by a former copyhold tenant under a license from the lord; in which case it has been held that the lord may calculate his fine upon the actual improved value, though it exceeds the amount of the annual rent received by the tenant himself—*Halton* v. *Hassell*, 2 Str. 1042; a case much stronger than the present, as the lord of the manor *is bound* to admit on payment of a reasonable fine.

Fine reasonable.

We cannot, therefore, hold that the fine demanded by the Duchy for the renewal of the letters patent, on the death of George Clayton, falling short in amount, as it does, of three years' actual value of the premises at rack rent, is any other than a reasonable fine; and, as it appears upon the facts found, that Sir William Clayton declined or neglected to renew upon the payment of that fine, we think he has not, within the proper meaning of the covenant, done his utmost endeavours to procure a renewal of the letters patent. And even in the calculation of the amount of the fine which he professed himself willing to pay, it does not appear that he allowed for the

1838.

SIMPSON v. CLAYTON.

full annual value of the premises to himself; for, although he included the whole of the annual rents which were paid to him, he did not make allowance for the fines which in some instances he had taken upon granting the leases.

Such being the view we take of the breach of the covenant on the death of George Clayton, the same reasoning must apply to the endeavour to procure a renewal, upon the death of the next life, James Medwin; and it is therefore unnecessary to say more than that there appears to have been a second breach of the covenant upon the occasion of his death.

The covenant one that runs with the land.

The defendant, however, has urged two objections against the right of the plaintiff to recover in this action. In the first place, he contends that the covenant upon which the action is brought is not a covenant which runs with the land. As to which we can feel no doubt but that a covenant made with the lessee to procure the original letters patent to be renewed, and the lease itself under which the tenant holds to be confirmed absolutely for a certain term, is a covenant which more strictly and peculiarly may be said to run with the land than any other; inasmuch as it affects the very existence and continuance of the term itself created by the lease. And the judgment of the court of King's Bench in the case of *Roe* d. *Bamford* v. *Hayley*, 12 East, 464, affords an authority directly in point upon the subject.

Plaintiff, as assignee of part, entitled to sue in respect of his interest.

It is further objected that the plaintiff, being assignee of part only of the interest of the original lessee, cannot sue upon this covenant to procure a renewal of the letters patent, inasmuch as such covenant cannot in its nature be apportioned: for, in what manner, it is asked, can the defendant procure a renewal of five sixths of the interest which passed under the Duchy lease? And, again, if the assignee of the remaining one sixth should be unwilling to continue tenant as to that interest, is the defendant

1838.

SIMPSON v. CLAYTON.

compellable to take it to himself? The latter difficulty, however, does not seem to apply to the case. The original lessees, Ismay and Harrison, took an interest for sixty-five years and a quarter, not only if the three lives named in the Duchy lease should so long live, but if any other person or persons to be nominated upon the falling in of their lives, should so long live: it being declared to be the object and intention of the renewal that the lessees' interest should be confirmed absolutely for sixty-five years and a quarter. It is not therefore optional in the assignees of the original lessees to declare whether they will take any interest after such renewal or not; they take for the whole term, if the Duchy lease is renewed for that term from time to time. And, as to the right of the plaintiff to sue, without joining the assignee of the remaining one sixth, it is to be observed that the plaintiff and the assignee of that interest are tenants in common, having separate and distinct interest in the term; and that the damages are in their nature severable, and may well be apportioned by the jury, according to the value of the share of each. And no case appears to have laid it down that tenants in common *must* join in an action of covenant: the utmost that has been established seems to be that tenants in common *may* join in those actions of covenant which are merely personal, and sound in damages only, as, on the covenant to repair—*Kitchin* and *Knight* v. *Buckly*, 1 Lev. 109, T. Raym. 80, 1 Sid. 157, 1 Keb. 565, 572.

Upon the whole, therefore, it appears to us, that, notwithstanding the objections urged by the defendant, the plaintiff has the right to sue for the proportion of the damages sustained by him; and that, as there has been a breach of the covenant declared upon, the plaintiff is entitled to our judgment upon the facts found in this special verdict.

Judgment for the plaintiff.

1838.

Friday, June 8th.

HARTLEY *v.* BURKITT.

The declaration, in an action by a landlord against his tenant, charged the latter with a breach of duty in not cultivating land in a good and husbandlike manner *and* according to the custom of the country, in this, that he (amongst other things) contrary to the custom of the country, carried away hay without returning a proportionate quantity of manure. The defendant, as to so much of the declaration as charged him with carrying away the hay contrary to the custom of the country, pleaded that no such custom existed as that alleged: —Held, good on special demurrer.

THIS was an action for not cultivating land in a husbandlike manner.

The declaration stated, that, on the 11th October, 1831, the defendant had become and was tenant to the plaintiff of a certain close of pasture land, with the appurtenances, situate and being in the parish of Covenham St. Mary, in the county of Lincoln, and by reason thereof it became and was the duty of the defendant during the said tenancy to manage, use, and cultivate the said close in a good and husbandlike manner, and according to the custom of the country where the close was so situate as aforesaid; that the defendant continued such tenant, and the said tenancy continued for a long time, to wit, until the 6th April, 1836; yet the defendant, not regarding his duty in that behalf, whilst he was such tenant, to wit, on the 1st January, 1835, and on divers other days and times afterwards, wrongfully and injuriously, in a bad and unhusbandlike manner, and contrary to the custom of the country where the close was so situate, cut down, demolished, and destroyed the underwood and growth of and otherwise injured and damaged the hedges, fences, and thorns then being in and upon and parcel of the said close, and the materials, bushes, and wood coming and arising from the said hedges, fences, and thorns then took and carried away, and converted and disposed thereof to his own use; that the defendant, further disregarding his duty in that behalf, whilst he was such tenant, to wit, on the 1st January, 1831, and on divers other days and times afterwards and in the five next succeeding years, wrongfully and injuriously, and in a bad and untenantable manner, and contrary to the custom of the country where the said close was situate as aforesaid, took and carried away off and from the said close, divers, to wit, five hundred cart-loads of hay which had arisen,

1838.

HARTLEY v. BURKITT.

grown, and been made on the said close during the tenancy, and spent and consumed the same elsewhere than on the said close, or any part thereof, without at any time bringing back and spending and spreading on the said close one load of dung, manure, or compost, for or upon each and every acre of the said close during each and every year of the tenancy, and without bringing back, spending, or spreading on the said close any dung, compost, or manure whatever: by means of which several premises the hedges and fences of the said close had become and were much injured and damaged, insomuch that divers sheep and cattle lawfully being in and near to the adjoining closes and premises, had since the defendant ceased being such tenant escaped and erred into the said close, and ate up and depastured the grass and herbage thereof, and otherwise much injured and damaged the same, and the said hedges and fences; and also by means of the premises the said close became and was impoverished and deteriorated in value, and the plaintiff was by means of the premises otherwise greatly injured and damnified.

Pleas.

Pleas—first, to the whole declaration, not guilty—secondly, as to so much of the declaration as related to and charged the defendant with carrying away off and from the close in the declaration mentioned divers large quantities of hay which had arisen and been made on the said close during the tenancy, and spending and consuming the same elsewhere than on the said close or any part thereof, without at any time bringing back and spending and spreading on the said close one load of dung, compost, or manure for or upon each and every acre of the said close during each and every year of the said tenancy, by the defendant above supposed to have been done, and that the doing so was contrary to the custom of the country where the close was situate, the defendant said, that, at the said time when &c. in the part of the declaration in that behalf mentioned, there was not nor is there now any

1838.

HARTLEY v. BURKITT.

such custom of the country as the plaintiff had in the said part of his declaration in that behalf alleged—concluding to the country.

To this plea the plaintiff demurred specially—assigning for causes, that the defendant in and by his plea had divided an indivisible allegation in the declaration, that allegation in substance being that the defendant was guilty of a breach of duty in not managing, using, and cultivating the said close in a good and husbandlike manner and according to the custom of the country; that the defendant had alleged in his plea matters of defence only to part of that indivisible allegation, viz. that the defendant was not guilty of a breach of the custom of the country; that the plea tendered an issue of a fact immaterial when it stood by itself, viz. the custom of the country; that no such custom was alleged in the declaration; that the defendant had not in and by his plea denied or confessed and avoided the matters to which the plea was pleaded; and that the plea amounted to the plea of not guilty to part of the grievances in the declaration alleged, and was argumentative. Special demurrer.

The defendant joined in demurrer. Joinder.

Wightman, in support of the demurrer.—The duty charged in the declaration, is, to manage and cultivate the land in a good and husbandlike manner *and* according to to the custom of the country. The plea, passing by the charge of using the land in an unhusbandlike manner, confines itself to a denial of the existence of any custom. That clearly is no answer to the action; for, even though there be no custom, the tenant is bound to manage the land in a good and husbandlike manner. [*Coltman*, J.—There is no duty in law resulting from the custom of the country.] *Angerstein* v. *Handson*, 1 C. M. & R. 789, is precisely in point. That was an action brought by a landlord against his tenant for not properly cultivating a farm.

1838.

HARTLEY v. BURKITT.

The declaration alleged that the defendant undertook to cultivate and manage the farm and lands according to the course of good husbandry and the custom of the country where the farm was situate, and then went on to aver, that, according to the course of good husbandry and the custom of the country, the defendant ought to have had about one-half only of the arable lands in corn, one-fourth in seeds, and the remaining fourth in turnips or fallow; and alleged as a breach that the defendant had more than one-half in corn &c., &c. The defendant by his plea traversed the custom as alleged in the declaration. At the trial the jury found that the custom was not as the plaintiff had alleged, but that the farm had been cultivated contrary to the course of good husbandry in the neighbourhood: and the court of Exchequer held that the plaintiff had tied himself up to the precise custom as alleged in the declaration, and, having failed to prove it, was not entitled to recover. Parke, B., delivering the judgment of the court, says: "The plaintiff by the form of his declaration has made the precise custom material. He might have declared so as not to have tied himself up to this precise custom. He might have declared generally that the defendant undertook to manage the farm according to good husbandry and the custom of the country, and then alleged as a breach that he had not so managed and cultivated, in this, that he had more land in corn &c. than he ought to have had. The custom then would have been left more at large. By pleading as he has done, he has tied himself up to the precise custom as alleged in the declaration, and, having failed to prove it, we think he was not entitled to recover." Here the plaintiff has not tied himself up to the precise custom; and the plea only takes issue on one part of an indivisible allegation; the other part being left wholly unanswered. [*Martin* stated that there was a plea of not guilty to the whole declaration. *Tindal*, C. J.—Suppose the defendant had

pleaded not guilty to the whole declaration, and as to so much of the declaration as charged a breach of the custom of the country, that there was no such custom: why would that not do? *Coltman*, J.—The second plea in the commencement limits the defence to the custom alleged as to the hay.] The plea does not answer that which it professes to answer; and the general issue cannot aid the deficiency of the special plea.

Martin, contra.—The plea in question answers every part of the breach which it professes to answer, and is the most obvious and direct answer that could be given; and the matters involved in it clearly could not be given in evidence under not guilty—*Wright* v. *Lainson*, 2 M. & Welsby, 739. On not guilty here, the custom of the country would be admitted: and, traversing the custom, we traverse the only material part of the breach. In *Angerstein* v. *Handson* the sole question was as to the effect of the evidence at the trial.

Wightman, in reply.—The plea is clearly bad, as amounting to not guilty. Under not guilty, the custom must come in issue; for, the plaintiff, in order to entitle himself to a verdict, must prove, not only that the defendant failed to cultivate the land in a good and husbandlike manner, but also the existence of the custom as alleged.

TINDAL, C. J.—The plea professes only to answer so much of the declaration as charges the defendant with carrying away hay, without bringing back a proportionate quantity of manure, contrary to the custom of the country. I see no real objection to the plea. Probably the plaintiff will amend, by striking out of his declaration the allegation as to the custom, or in such other way as he may be advised.

Wightman assenting—

Rule accordingly.

1838.

Thursday, June 7th.

J. S., tenant for life, under the will of his father, P. S., with a power of leasing for twenty-one years, in 1812 demised to T. C. for ninety-nine years, if he J. S. should so long live: in 1814, he, in the exercise of his power, granted a lease for twenty-one years to the defendant: in 1828, the surviving executor under the will of P. S., in exercise of a power to that effect in the will, granted a lease for one thousand years, for the purpose of raising money to pay debts and legacies:—Held, that the leasing power of J. S. under the will was not suspended by the lease of 1812, so far as regarded the grantee of the term under the power to demise by way of mortgage given to the executors; and consequently that such grantee had the immediate reversion in him, and might sue upon the covenants in the lease of 1814.

BRINGLOE *v.* GOODSON.

THE declaration stated that one Peter Sers, in his life-time, now deceased, before and at the time of making the last will and testament of the said Peter Sers, and from thence until and at the time of his death as thereinafter mentioned, was seised in his demesne as of fee of and in the messuage or tenement, closes, marshes, lands, grounds, and premises, with the appurtenances thereinafter mentioned to have been appointed and demised to the defendant; and, being so seised thereof, he, the said Peter Sers, in his life-time, to wit, on the 6th April, 1811, duly made and published his last will and testament in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and signed by him the said Peter Sers, and attested and subscribed in the presence of the said Peter Sers by three credible witnesses, according to the form of the statute in such case made and provided; and thereby, amongst other things, gave and devised the said messuage or tenement, closes, marshes, lands, grounds, and premises, with the appurtenances, unto William Maples in his life-time, now deceased, and John Brown, and their heirs, to hold to them, their heirs and assigns—to the use of his the said Peter Sers' son James Sers and his assigns for his life, without impeachment of waste, except as therein is excepted, with divers remainders over, and with power to his executors thereinafter named, or the survivor of them, his executors or administrators, to raise any sum or sums of money by mortgage or charge of or on all or any part of his, the testator's, real estates, either in fee or for terms of years or otherwise as might be found most convenient; and, for that and other the purposes in the said will mentioned, to convey and assure the same estates, or any part thereof, to any person or persons who

1888.

BRINGLOE v. GOODSON.

Power of leasing.

should be willing to lend or advance any money on security of the same; and in which said will of the said Peter Sers there was and is also contained a certain proviso, that is to say, that it should and might be lawful to and for the person or persons who for the time being should be entitled to the rents or profits of all or any part of the said premises under the limitations thereinbefore contained, and to and for his the said Peter Sers' executors, and the survivor of them, his executors and administrators, from time to time, and at all times during the minority of the person or persons so entitled, by indenture or indentures to be sealed and delivered by him or them respectively in the presence of one, two, or more credible witnesses, to limit and appoint by way of demise or lease all or any part or parts of the premises, with the appurtenances, to any person or persons, for any term or number of years not exceeding twenty-one years, to take effect in possession, and not in reversion or by way of future interest, so as there should be reserved in every such limitation or appointment by way of demise or lease the best or most improved yearly rent or rents, to be incident to the immediate reversion of the hereditaments so to be limited or appointed, that could or might be reasonably had or gotten for the same, without taking any fine, premium, or foregift for making thereof, and so as there should be contained in every such indenture of limitation or appointment by way of demise or lease a covenant for re-entry for non-payment of the rent or rents to be thereby respectively reserved for the space of twenty-one days after the same rents respectively should become due and payable, and so as the person or persons respectively to whom such limitation or appointment by way of demise or lease should be respectively made should execute counterparts of the indenture or indentures to be made by him, her, or them respectively, and thereby covenant for the due payment of

1838.

BRINGLOE v. GOODSON.

the rent or rents thereby respectively reserved, and so as the person or persons respectively to whom such limitation or appointment should be made, his or their executors, administrators, or assigns, should not by any clause or words to be contained in any such indenture or indentures be made dispunishable for waste, or exempted from punishment for committing waste; and by his said will the said Peter Sers duly appointed the said W. Maples and John Brown executors thereof: and afterwards, to wit, on the 30th November, 1811, the said Peter Sers died so seised of the messuage or tenement, closes, marshes, lands, grounds, and premises, with the appurtenances, without revoking or altering the said will as to the said devise of the said premises with the appurtenances; and afterwards, to wit, on the 30th November in the year last aforesaid, the said W. Maples and John Brown duly proved the said last will and testament of the said Peter Sers, and took upon themseves the burthen of the execution thereof: and afterwards, to wit, on the 19th June, 1812, the said W. Maples died, and the said John Brown then survived, and thereupon became and was and still is the surviving executor of the said last will and testament of the said Peter Sers deceased, and had execution thereof: that the said James Sers, *then being entitled, under the limitations in the said last will and testament of the said Peter Sers contained, to the rents and profits of the premises hereinafter mentioned to have been demised to the defendant, being part of the said premises in the said last will and testament mentioned, afterwards, and after the said James Sers had attained the full age of twenty-one years*, to wit, on the 31st December, 1814, by a certain indenture then made between the said James Sers of the one part, and the defendant of the other part, sealed and delivered by him the said James Sers in the presence of two credible witnesses, whereon such best and most improved yearly

Death of Peter Sers.

Proof of his will.

Death of W. Maples, the executor.

Lease of Dec. 31, 1814, from James Sers to the defendant.

rent as aforesaid was and is reserved, without taking any fine, premium, or foregift, and containing such covenants as aforesaid, the counterpart of which said indenture, sealed with the seal of the defendant, the plaintiff now brings here into court, the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid, the said James Sers, for the considerations therein mentioned, by virtue and in exercise of the power and authority given to him in and by the said last will and testament of the said Peter Sers, and also by virtue and in exercise of all other powers and authorities enabling him in that behalf, did by way of demise or lease limit and appoint, and by way of further assurance demise and lease and to farm let unto the defendant, his executors, administrators, and assigns, the said messuage or tenement, closes, marshes, lands, grounds, and premises, with the appurtenances, except as in the said indenture is excepted, to have and to hold the same, except as before excepted, unto the defendant, his executors, administrators, and assigns, from the 11th October then last past for and during and unto the full end and term of twenty-one years, thence next ensuing, and fully to be complete and ended, yielding and paying therefore yearly and every year during the said term unto the said James Sers and his assigns, and unto the person or persons who for the time being should be entitled to the reversion of the said premises thereby appointed and demised, immediately expectant upon the determination of the said term thereby granted as aforesaid, the rent or sum of 1,500*l.*, by four equal quarterly payments in the year, that is to say, on the 6th January, the 6th April, the 6th July, and the 11th October in every year, the first payment thereof to be made on the 6th January, then next ensuing; and also yielding and paying such further and increased or substituted yearly rents as in the said indenture mentioned,

1838.

BRINGLOE v. GOODSON.

Increased rent.

in the events therein also mentioned; and also yielding and paying yearly and every year during the continuance of the said term thereby granted, unto the said James Sers and his assigns, and to the person or persons for the time being entitled as aforesaid, the further yearly rent or sum of 10*l.* for every acre, and so in proportion for any less quantity than an acre, of all and every the said closes, marshes, lands, grounds, and premises thereby appointed and demised, or intended so to be, which should at any time during the said term thereby granted be ploughed, dug, broken up, cut, converted, or managed contrary to the several covenants therein and hereinafter contained on the part of the defendant, or contrary to the true intent and meaning of the said indenture; which said several further or substituted yearly rent or rents and sums of money thereby or thereby intended to be reserved, were to be payable quarterly, in manner and at the several times therein and hereinbefore mentioned and appointed for the payment of the said first mentioned yearly rent; and the first quarterly payments of the said respective further yearly rents were to be made on such of the said days or times of payment therein and hereinbefore mentioned as should happen next after the same respective further rents should respectively be incurred; and the same respective further rents, or such of them as should respectively be incurred, were to continue payable thenceforth during all the then residue of the said term thereby granted: and the defendant did in and by the said indenture, for himself, his heirs, executors, administrators, and assigns, amongst other things, covenant, promise, and agree to and with the said James Sers, his executors, administrators, and assigns, and to and with the person or persons who for the time being should be entitled to the reversion of the said premises thereby appointed and demised, or intended so to be, immediately expect-

1838.

BRINGLOE v. GOODSON.

ant on the determination of the said term thereby granted, in manner following, that is to say, that the defendant, his executors, administrators, or assigns, should and would well and truly pay or cause to be paid unto the said James Sers, or his assigns, and unto the person or persons who for the time being should be entitled as aforesaid, the said several rents or sums thereinbefore reserved, at or upon the days and times and in manner and form thereinbefore limited and appointed for the payment of the same respectively, according to the respective reservations thereof therein and hereinbefore contained, and according to the true intent and meaning of the said indenture; and also that he, the defendant, his executors, administrators, or assigns, should not nor would at any time or times during the said term thereby granted do or cause or suffer to be done to the said premises thereby appointed and demised, or intended so to be, or any part thereof, any waste or damage whatsoever, but should and would, during all the continuance of the said term, farm, cultivate, use, and manage all and singular the said premises thereby appointed and demised, or intended so to be, in a good and husbandlike manner; as by the said indenture, reference being thereunto had will, amongst other things, more fully and at large appear: By virtue of which said indenture, the defendant afterwards, to wit, on the 31st December, 1814, aforesaid, entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof, and continued so thereof possessed until and upon the 11th October, 1835, when the said demise ended and determined; that, after the making of the said indenture of appointment and demise, and during the continuance of the said term thereby granted, and after the death of W. Maples, to wit, on the 14th June, 1828, by a certain indenture of mortgage then made between the said John Brown of the first part, the said

Mortgage term for 1000 years created by Brown, June 16, 1828.

1838.

BRINGLOE v. GOODSON.

James Sers of the second part, and the plaintiff of the third part, [profert], after reciting as therein is recited, in consideration of the sum of 5,666*l.* 15*s.* 8*d.* paid by the plaintiff into the name and with the privity of the Accountant-General of the court of Chancery, as therein mentioned, and also in consideration of 10*s.* to each of them the said John Brown and James Sers paid by the plaintiff, he the said John Brown, with the privity of the said James Sers, testified as therein mentioned, did, by virtue of the powers and authorities to him given and reserved or in that behalf enabling him, and in the will of the said Peter Sers contained, bargain, sell, and demise, and the said James Sers did grant, demise, and confirm, unto the plaintiff, his executors, administrators, and assigns, amongst other things, the said messuage or tenement, closes, marshes, lands, grounds, and premises, with the appurtenances, to hold the same unto the plaintiff, his executors, administrators, and assigns, from the day next before the day of the date of the said last-mentioned indenture, for the term of 1000 years, at the yearly rent of a pepper corn, if lawfully demanded, subject to a certain proviso or condition for redemption and for making void the said indenture of mortgage, on payment by the said James Sers or his assigns of the sum of 5,666*l.* 15*s.* 8*d.*, with interest as therein mentioned, at a certain day and time therein also mentioned; whereupon and whereby the plaintiff then became and was entitled to the reversion of the said messuage or tenement, closes, marshes, lands, grounds, and premises so appointed and demised as aforesaid, immediately expectant upon the determination of the said term of twenty-one years so by the said first-mentioned indenture granted as aforesaid, and continued so thereto entitled until and upon the 8th May, 1835: And although the plaintiff had always from the time of making the said last-mentioned indenture hitherto well and truly performed, fulfilled, and kept all things in the

1838.

BRINGLOE v. GOODSON.

said first-mentiond indenture contained on the said lessor's part and behalf to be performed and fulfilled and kept, according to the tenor and effect, true intent, and meaning thereof; nevertheless, the defendant after the making of the said several indentures of lease and mortgage respectively, and during the joint continuance of the said terms thereby respectively granted, and whilst the plaintiff was so entitled to the said immediate reversion of the said messuage or tenement, closes, marshes, lands, grounds, and premises, with the appurtenances as aforesaid, to wit, on the said 14th June, 1828 aforesaid, and on divers other days and times between that day and the said 8th May, 1835 aforesaid, cultivated, used, and managed divers, to wit, two hundred acres of the said closes, marshes, lands, grounds, and premises in and by the said first-mentioned indenture appointed and demised to him the defendant as aforesaid, in a bad and unhusbandlike manner, contrary to the true intent and meaning of the said first-mentioned indenture, and of the covenant therein contained on the part of the defendant as aforesaid; whereby, and according to the form and effect of the first-mentioned indenture, the defendant became liable to pay to the plaintiff yearly and every year during the said last-mentioned space of time, by even and equal quarterly payments on the several days and times whereon the said rent or sum of 1,500*l.* in the said indenture mentioned was and is so made payable as aforesaid, the further yearly rent or sum of 2,000*l.*, being at and after the rate of 10*l.* for each of the said acres of the said closes, marshes, lands, grounds, and premises by the said first mentioned indenture appointed and demised, and by the defendant so cultivated, used, and managed in a bad and unhusbandlike manner as aforesaid: Yet, the defendant, although often requested so to do, had not paid to the plaintiff such further yearly rent as aforesaid, or any part thereof, but had wholly refused and neglected so to do, and there was then due and owing

Breach.

1838.

BRINGLOE v. GOODSON.

from the defendant to the plaintiff, for and on account of such further yearly rent which had accrued during the said last-mentioned space of time, a large sum of money, to wit, the sum of 9,000*l.*, for four years and a half of the said first-mentioned term of twenty-one years, ending on the 6th April, 1835, and then elapsed, contrary to the form and effect of the said first-mentioned indenture, and of the covenant of the defendant so by him in that behalf made as aforesaid: and so the plaintiff in fact said &c. &c.

First plea. The defendant pleaded—first, that Peter Sers did not devise in manner and form as the plaintiff had above

Second plea. alleged—secondly, that the indenture in the declaration firstly above mentioned was not his (the defendant's) deed—

Fifth plea. fifthly, that James Sers, at the time of the making of the indenture in the declaration firstly above mentioned, was not entitled under the limitations contained in the will of Peter Sers to the rents and profits of the premises in the declaration mentioned to have been demised to the defendant in and by the said indenture therein firstly above mentioned in manner and form as the plaintiff had above al-

Sixth plea. leged—sixthly, that the indenture in the declaration secondly mentioned, was not the deed of James Sers and John

Seventh plea. Brown—seventhly, that he, the defendant, did after the making of the indenture in the declaration firstly mentioned, and during the continuance of the said term thereby granted, farm, cultivate, use, and manage all and singular the said premises thereby appointed and demised, in a good and husbandlike manner, according to the tenor and effect, true intent, and meaning of the said covenant therein in that behalf contained. These pleas severally concluded to the country, and issues were joined thereon.

Third plea. The third plea stated, that, before the making of the said indenture in the declaration firstly mentioned, and whilst James Sers was seised in his demesne as of freehold for the term of his natural life of and in the said several premises in the said indenture and in this plea mentioned,

1838.

BRINGLOE v. GOODSON.

under and by virtue of the last will and testament of Peter Sers, to wit, on the 7th May, 1812, by a certain indenture then made between James Sers of the first part, George Hillyard of the second part, Thomas Clement of the third part, and George Hillyard King of the fourth part, which said indenture, not being in the possession of the defendant, the defendant could not bring into court, the date whereof was the day and year last aforesaid, the said James Sers did, for the considerations therein mentioned, demise unto the said Thomas Clement, his executors, administrators, and assigns, amongst other things, the said messuage or tenement, closes, marshes, lands, grounds, and premises, with the appurtenances, mentioned and comprised in the said indenture in the declaration firstly above mentioned, to have and to hold the same unto the said Thomas Clement, his executors, administrators, and assigns, for and during and unto the full end and term of ninety-nine years, to commence and be computed from the day next before the date of the said indenture in this plea mentioned, and from thence fully to be complete and ended, if the said James Sers should so long live, as by the said indenture, reference being thereunto had, will fully appear; and that, at the time of the making of the said indenture in the declaration secondly above mentioned, the said James Sers was and still is in full life, and the said term so granted to the said Thomas Clement as in this plea mentioned then was and still is existing and not in any manner determined, surrendered, or otherwise extinguished: whereby, and by reason whereof, the said James Sers, at the time of the making of the said indenture in the declaration secondly mentioned, had not any reversionary estate or interest of or in the said messuage or tenement, closes, marshes, lands, grounds, and premises, with the appurtenances, or any part thereof, immediately expectant or to take effect upon the expiration of the said term of and in the said premises so granted to the defendant as aforesaid, which could or

1838.

BRINGLOE v. GOODSON.

did pass to the plaintiff under or by virtue of the said last-mentioned indenture—verification.

Fourth plea.

The fourth plea stated, that, after the making of the indenture in the declaration firstly above-mentioned, and during the term thereby granted, and before the making of the indenture therein secondly mentioned, to wit, on the 23rd February, 1818, by a certain indenture sealed with the seal of the said James Sers, and then made between James Sers of the first part, Thomas Clement and Stephen Skurray of the second part, John Turner Clement of the third part, and George Hillyard King of the fourth part, which said indenture, not being in the possession of the defendant, the defendant cannot now bring into court, the date whereof is the day and year last aforesaid, the said James Sers, for the considerations therein mentioned, did grant to the said John Turner Clement, his executors, administrators, and assigns, the reversion of and in the said messuage or tenement, closes, marshes, lands, grounds, and premises mentioned and comprised in the said indenture in the said declaration firstly above-mentioned, with the appurtenances, to have and to hold the same unto the said John Turner Clement, his executors, administrators, and assigns, from a certain day and year therein named, to wit, from the day and year last aforesaid, for a certain term of years therein also mentioned, to wit, for the term of 99 years, if the said James Sers should so long live; whereby the reversion expectant upon the expiration of the said term so granted to the defendant as in the declaration mentioned, became and was vested in the said John Turner Clement for the said term so to him thereof granted as aforesaid; and that, at the time of the making of the said indenture in the declaration secondly above mentioned, the said James Sers was and still is in full life, and the said term so granted to the said John Turner Clement as aforesaid then was and still is existing, and not in any manner determined, surrendered, or otherwise extinguished—verification.

1838.

BRINGLOE v. GOODSON.

Replication to the third and fourth pleas.

To the third and fourth pleas the plaintiff replied—that the said Peter Sers in his life-time, being so seised of the said messuage or tenement, closes, marshes, lands, grounds, and premises, with the appurtenances, in the declaration mentioned to have been appointed and demised to the defendant as aforesaid, did in and by his last will and testament in writing, in the said declaration also mentioned, give and bequeath certain pecuniary legacies in the said will mentioned, and did thereby declare his will to be that all his just debts, as well on specialty as on simple contract, the said pecuniary legacies, and also the funeral and other expenses incidental to that his will, should be paid and satisfied out of his personal estate, provided the same should be sufficient for that purpose; and, in case the same should be insufficient, then the said Peter Sers thereby ordered and directed, authorized, and impowered the said William Maples and the said John Brown, or the survivor, his executors or administrators, to raise any sum or sums of money by mortgage or charge of or on all or any part of his real estates, either in fee or for terms of years or otherwise, as might be found most convenient; and, for the purposes aforesaid, to convey and assure the same estates, or any part thereof, to any person or persons who should be willing to lend or advance any money on security of the same; but subject nevertheless to redemption thereof on re-payment of the money so to be advanced or lent, with lawful interest for the same, so as each son's estate were equally charged: that, after the making of the said indenture of appointment and demise to the defendant in the declaration mentioned, and during the continuance of the term thereby granted, and after the death of William Maples, to wit, on the 14th June, 1828 aforesaid, the personal estate of the said Peter Sers was not sufficient to pay and satisfy all his just debts, as well on specialty as simple contract, and the pecuniary legacies bequeathed by his said will, and also his funeral and other

1838.

BRINGLOE v. GOODSON.

expenses incidental to his said will, but, on the contrary thereof, was insufficient for that purpose by a large sum of money, to wit, the sum of 5,666*l.* 15*s.* 8*d.*, being the amount of the deficiency of the said personal estate, which was necessary to be raised, and which he the said John Brown was duly authorized and impowered to raise by mortgage of the said messuage, tenement, closes, marshes, lands, grounds, and premises, with the appurtenances, so demised to the defendant as aforesaid, under and by virtue of the last will and testament of the said Peter Sers; and thereupon the said John Brown, afterwards, to wit, on the day and year last aforesaid, did, by virtue of the powers and authorities to him in that behalf given and reserved as aforesaid, raise the said sum of 5,666*l.* 15*s.* 8*d.*, by mortgage of the said messuage or tenement, closes, marshes, lands, grounds, and premises, with the appurtenances; and, for the purpose of raising the said sum of 5,666*l.* 15*s.* 8*d.* as aforesaid, he the said John Brown, by the said indenture of mortgage in the declaration mentioned, and now brought here into court, for the considerations therein mentioned, with the privity of the said James Sers, testified as therein mentioned, did, by virtue of the powers and authorities to him given and reserved in that behalf, and in the will of Peter Sers contained, bargain, sell, and demise unto the plaintiff, his executors, administrators, and assigns, (amongst other things) the said messuage or tenement, closes, marshes, lands, grounds, and premises, with the appurtenances, so demised to the defendant as aforesaid, to hold the same unto the plaintiff, his executors, administrators, and assigns, from the day next before the day of the date of the said last-mentioned indenture, for and during and unto the full end and term of 1000 years from thence next ensuing, and fully to be complete and ended, at the yearly rent of a pepper-corn, if lawfully demanded, subject to the said proviso or condition in the said declaration mentioned for redemption

and for making void the said indenture of mortgage, on payment by the said James Sers, or his assigns, of the sum of 5,666*l.* 15*s.* 8*d.*, with interest as therein mentioned, on a certain day now past; and which said sum of 5,666*l.* 15*s.* 8*d.* is still wholly due and unpaid; and by means of the several premises aforesaid, the plaintiff then became and was entitled to the reversion of the said messuage or tenement, closes, marshes, lands, grounds, and premises so appointed and demised as aforesaid, immediately expectant upon the determination of the said term of twenty-one years so by the said indenture of appointment and demise to the defendant granted as aforesaid, and continued so entitled thereto until and upon the 8th May, 1835 aforesaid, in manner and form as the plaintiff had above in his said declaration in that behalf alleged—verification.

To these two pleas the defendant demurred generally, and the plaintiff joined in demurrer.

The point marked for argument, was, that the replication did not answer the matters of the said pleas, and did not shew that the plaintiff had any right to sue, as the party possessed of the reversion of the demised premises, or any part thereof.

W. H. Watson, in support of the demurrer.—To constitute the plaintiff a reversioner within the meaning of the statute 32 Hen. 8, c. 34, under the lease of 1814 that lease must be a valid lease in execution of the power. It may be conceded that the mortgage by Brown, the surviving executor, in 1828, for one thousand years, was a valid execution of the power given by the will of Peter Sers to the executors to raise money for the payment of debts and legacies: it over-rides the estate of the tenant for life. But it is contended—first, that the plaintiff is not assignee of the reversion as regards the lease of 1814, inasmuch as that was not a valid lease in execution of the power; the tenant for life having before then (viz. in 1812)

1838.

BRINGLOE v. GOODSON.

created a term of ninety-nine years out of his life estate, whereby his leasing power was suspended: in other words, the lease of 1814 took effect only by estoppel—secondly, that the leasing power could only have been exercised by the person entitled to the rents and profits; whereas, at the time of granting the lease of 1814, the termor, and not James Sers, was the person entitled to the rents and profits—thirdly, that the lease of 1814 could not take effect in possession.

1. It is perfectly clear, that, if tenant for life, with a leasing power, conveys away his life-estate, his leasing power is extinguished: if he grants a lease, the power is suspended. In either case, a further exercise of the power would derogate from his grant. *Yelland* v. *Ficlis*, F. Moore, 788; *Corker* v. *Ennys* and *Vincent* v. *Ennys*, Viner's Abridgment, *Authority* (G), pl. 10; *Long* v. *Rankin*, Sudgen on Powers, Appendix, No. 2. In *Ren* d. *Hall* v. *Bulkeley*, Doug. 291, Lord Mansfield, held, that, where the conveyance by the tenant for life was only by way of mortgage or security, the power was not destroyed. But the propriety of that decision has since been doubted—see *Williams* v. *Bosanquet*, 1 Brod. & Bing. 238, 3 Moore, 500. In Sudgen on Powers, 6th edit., 66, it is said: "It is settled that an alienation of the life-estate prevents an exercise of the power: it necessarily must have that operation. The power cannot be transferred to the alienee of the estate, nor can it be reserved distinct from the estate. As, therefore, a conveyance of the whole estate is at law an absolute transfer, although only by way of mortgage or security, it would seem that such a transfer would operate to prevent the exercise of the power. With a view to guard against this operation, it has been the practise upon a mortgage to make the security simply for years, depending upon the life, and for the mortgagor to covenant not to exercise his power of leasing without the consent of the mortgagee. By such an arrangement,

the donee of the power still remains tenant for life, and so fills the character in respect of which the power was reposed in him. He is entitled to place a restraint on his exercise of the power; and, as the incumbrancer would consent to the exercise of it, a lease might, without objection, still over-ride the original life-estate, including the term carved out of it, just as if no mortgage had been created." The term for one thousand years created by Brown, the surviving executor, stands first in priority of law; next comes the term for ninety-nine years granted to Clement in 1812; next, and subject to that term, the lease to the defendant in 1814; and then the life-estate of James Sers. It is obvious, therefore, that the plaintiff cannot be assignee of the term created by the lease of 1814. That lease purports to be made in execution of the leasing power, and also by way of grant or demise. Consequently it took effect only by estoppel as between the defendant and James Sers.

2. The leasing power is granted to the person or persons for the time being entitled to the rents *or* profits: and the title to these was vested in Clement by the lease of 1812. *Roe* d. *Brune* v. *Prideaux*, 10 East, 158; *Ren* v. *Bulkeley*.

3. The lease of 1814, not taking effect in possession, was not a good execution of the power. In *Shaw* v. *Summers*, 3 Moore, 196, under a power to trustees "to lease premises for a term not exceeding twenty-one years, and determinable as a former term of ninety-nine years was determinable, as they should think proper:" it was held, that such a power authorized only a lease in possession, and not in futuro; and, as the trustees had let the premises for ten years, determinable as in the original lease, and afterwards re-let them for the term of eleven years, before the expiration of the ten years' lease, that the second lease was void, and a bad execution of the power.

1838.

BRINGLOE v. GOODSON.

Coote, contra.—A grant by tenant for life, with power of leasing, of a term by way of mortgage, neither extinguishes nor suspends his leasing power. James Sers was legal tenant for life under the will of his father, with power of leasing: but his estate was subject to the power vested in the executors and the survivor of them, authorizing a mortgage in fee or for term of years, for raising money to pay debts and legacies. In May, 1812, James Sers made a demise for ninety-nine years to Thomas Clement. This lease took effect out of his estate for life, but left in him the legal freehold, subject to the demise. The grant to Clement would suspend the operation of the power of leasing under the will, that is, it would postpone the estate created under the power: but it would not suspend the actual exercise of the power. The lessee would take without prejudice to the prior demise to Clement, so long as the latter had continuance. The lease granted under the power would not take effect out of the estate of the lessor, but *out of the estate of the person creating the power*, viz. out of the estate of the devisor, in like manner as if the lease under the power had been *granted by the devisor:* and the covenants would not operate as covenants entered into with the tenant for life, but as covenants entered into with the devisor himself—*Whitlock's* case, 8 Rep. 141; *Isherwood* v. *Oldknow*, 3 M. & S. 382. And therefore, on the determination of the demise created out of the life estate of James Sers, the lease created out of the power would be the first estate, and the covenants in it would run with all the estates in reversion created out of the estate of the devisor. Then comes the deed of June, 1828, which, to the extent of the interest created by it, that is, the term of one thousand years, defeated the estate of the tenant for life, and all the estates *created out of it*, and consequently the demise for ninety-nine years to Clement. But this would not prejudice the lease created out of the *devisor's* estate under the power of leas-

ing. So that, after the exercise by the surviving executor of the power of charging, the estate would stand limited, first to the defendant for the term of twenty-one years, subject to the rents and covenants; with an immediate remainder to the plaintiffs for the thousand years. Since the case of *Isherwood* v. *Oldknow*, the law appears clearly settled, that the several persons taking under the limitations in a settlement or devise, will be grantees of the reversion under the 32 Hen. 8, c. 34, so as to have the benefit of covenants entered into with a party granting a lease under a power created by the settlement or will. Sugden must be taken to refer to a bonâ fide lease carrying possession, and not a grant by way of mortgage. He says (6th edit. 55): "If a tenant for life, with a power of leasing in possession, were to grant a lease *out of his interest*, that would really *suspend* the power, in the proper sense of the term; for leases under the power, could be granted only in possession, and such a lease the donee could not grant, in consequence of his previous lease out of his interest. Of necessity, therefore, the power would be suspended: there could be no valid execution of it until the possession was vacant. In *The Attorney-General* v. *Gradyll*, Bunbury, 92, two judges thought the power was suspended by a lease granted by the tenant for life, not under his power, to trustees for ninety-nine years, if he should so long live, although it was only to secure his debts." It is evident, therefore, that that learned author does not assent to the doctrine of that case. Notwithstanding the disposition that has in some quarters been evinced to impugn the authority of *Ren* d. *Hall* v. *Bulkeley*, that case has latterly been more favorably mentioned in courts of equity. If it be law, it goes the whole length of the argument in the present case. There, a tenant for life, with a power of leasing at rack rent in possession, conveyed his life estate to a trustee and his heirs, to pay out of the profits a life annuity, and the surplus to

1838.

BRINGLOE v. GOODSON.

himself, the tenant for life. He afterwards conveyed the estate to trustees for ninety-nine years, if he should so long live, for the payment of his debts, but with an express reservation as to all leases granted or to be granted. He afterwards of his own authority granted a lease under his power: and the question between the assignee of the lessee and the grantee of the remainder-man under the settlement, after the death of the tenant for life, was, whether the operation of the *first* conveyance did not invalidate the lease. Lord Mansfield said: "Powers came into the courts of common law with the statute of uses (27 Hen. 8, c. 10), and the construction of them, by the express direction of the statute, must be the same as in courts of equity (*Taylor* d. *Atkyns* v. *Horde*, 1 Bur. 120; *Zouch* d. *Woolston* v. *Woolston*, 2 Bur. 1146). The creation, execution, and destruction of them depend on the substantial intention and purpose of the parties. It is said, 1. That the grantor in this case was not in possession, and that it was necessary that he should be, to execute the power. But I think possession here means the receipt of the rents and profits, which were applied to his use. If *actual* possession were necessary, a leasing power could never be executed where the land is in the hands of a tenant (vide *Goodtitle* v. *Funnucan*, Doug. 565). 2. It is contended, that, by granting away his life estate, he extinguished the power. Certainly, where the whole life estate is conveyed away by the intention of the parties, the power must be at an end, and cannot be afterwards exercised to the prejudice of the grantee. But the conveyance here was only to let in a particular charge, subject to which the rents and profits still belonged to Lord Onslow; and the lease could not prejudice the security, nor the remainder-man, for the best rent must be reserved." So, here, the best rent being reserved, the lease cannot derogate from the previous grant. *Long* v. *Rankin*, and *Walmesley* v. *Butterworth*, Coote on Mortgages, 698, are authorities to the same effect. The leas-

ing power therefore was not suspended, James Sers was, at the time of granting the lease of 1814, the person entitled to the rents and profits, and the lease of 1814, being made in exercise of the leasing power, was a good lease in possession.

W. H. Watson, in reply.—There is nothing on the face of the pleadings to shew that the term created by the lease of 1812 was to secure a mortgage: and the court will not assume it. It is upon the face of it an absolute conveyance of the premises to Clement for ninety-nine years; and therefore clearly operated a suspension of the leasing power of James Sers. Whether or not a lease reserving the best rent is a benefit or an injury to the reversioner, will depend upon a variety of circumstances: if an insufficient tenant were accepted, it would clearly be an injury. The court can only deal with the instrument before them; they cannot regard the equities of the parties.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—

This was an action of covenant brought against the defendant for the recovery of certain additional rents reserved in a lease by way of penalty for the breach of farming covenants. The lease was made in 1814, by James Sers, the tenant for life, under a power of leasing given to him by the will of his father, Peter Sers; and no objection is taken as to the lease not being made in compliance with the particular terms of the power. The plaintiff claims as the assignee of the reversion of such lease, resting his claim upon a term of one thousand years created in the year 1828 by the surviving executor named in the will of the said Peter Sers, under a power given by the will to the executors to raise money for the payment of debts and

1838.

BRINGLOE v. GOODSON.

legacies: and no question whatever is raised as to the due execution of this power. But the defendant sets up as an answer to the plaintiff's right of action a demise by James Sers, the tenant for life, to Thomas Clement, prior in point of date to the execution of the leasing power, viz. upon the 7th May, 1812, for the term of ninety-nine years, if James Sers should so long live, contending that the creation of this term for ninety-nine years suspended the exercise of the leasing power during the continuance of such demise.

As to the lease of 1812.

What the particular object or intent of the demise for ninety-nine years may have been, does not appear to us judicially, either by the plea which sets forth the indenture of demise, or by the replication. No argument, therefore, can be derived from any such object or intention; but the demise must be considered simply as a lease for ninety-nine years, by the tenant for life, not taking its effect under the power, but out of the estate or interest of the tenant for life, and leaving the immediate legal reversion upon such lease in such tenant for life: and, whether, as against the lessee for one thousand years, the leasing power is or is not suspended by this demise for ninety-nine years made by the tenant for life, appears to be the principal question in the case.

Leasing power not destroyed.

That the leasing power is not destroyed, appears to be well established by the cases. The tenant for life not having conveyed away his life estate, but only granted a lease for years to Clement, the utmost effect of this lease is, that the power of leasing has been *suspended* so far as regards *the lease and interest of Clement—Long* v. *Rankin*, Sudgen on Powers, Appendix No. 2, Dom. Proc. And, if there had been no power created by the will besides that leasing power, and the contest had taken place between the grantee of the term for ninety-nine years created by the tenant for life, and the lessee for twenty-one years under the leasing power, there can be no ques-

1838.

BRINGLOE v. GOODSON.

tion but that the former might have prevailed, if the leasing power subsequently exercised operated to the prejudice of the grantee.

But the question in this case arises between the plaintiff, claiming under a power given by the will to the executors in trust, and the lessee of the tenant for life under the power; and, to determine whether the latter can set up the prior grant of the tenant for life, it is necessary to observe the legal relation in which the several estates stand with respect to each other as to their priority.

It is well established, that, whatever estates are granted by virtue of a power, take effect as if they were granted by the deed creating the power: and, consequently, in the present case, the demise for one thousand years under which the plaintiff claims, being granted under the power given by the will, operates as if it had been created by the will itself which gives such power to the executors; and, if considered as created by the will, it must of necessity over-ride the lease for ninety-nine years granted by the tenant for life out of his own estate. Again, the lease for twenty-one years, which was granted under the leasing power, supposing that power not to be absolutely suspended, must be considered as if granted by the will itself, and therefore in any case not affecting the interest of the lessee as over-riding the grant made by tenant for life out of his own estate.

Lease for 1000 years.

The case, therefore, may be considered as if it stood thus:—The donor of the power, having granted a lease for twenty-one years to Goodson, afterwards grants the reversion to Bringloe for one thousand years, and then grants an estate for life to James Sers, who demises to Clement for ninety-nine years if he, James Sers, should so long live. Now, if the lease for one thousand years made in 1828, instead of being granted, as it is, under the power given to the executors, had been granted under a power given to the tenant for life, Clement, the grantee of

Order of priority of the several grants.

1838.

BRINGLOE v. GOODSON.

the term for ninety-nine years, whether it was a mortgage term or otherwise, might well insist upon his right to the rents and profits, in preference to the appointee of his lessor; or, if the lease for twenty-one years had been disadvantageous to him, he might possibly have a right to dispute that also, as being granted in derogation of his lease. But, if his term for ninety-nine years is overreached by the lease for one thousand years, the term for ninety-nine years cannot, as it appears to us, stand in the way of the plaintiff, the termor for one thousand years, to prevent his recovering the rent, in the same manner in which he might have done if the lease for ninety-nine years had never existed: in which case it appears clear that the plaintiff might sue the lessee, as assignee of the reversion, upon the principle laid down in the case of *Isherwood* v. *Oldknow*, 3 M. & S. 382.

The lease for one thousand years being granted by Brown, the surviving executor, under a distinct power from that given to the tenant for life, and which power the tenant for life had no right to obstruct, Clement, the lessee for ninety-nine years under the tenant for life, could not stand in a better situation than the tenant for life, and therefore could have no right to set up his interest against that of the grantee of Brown under the power; and, if Clement himself could have no such right, what right can the lessee for twenty-one years under the power have to set up the right of Clement against the grantee of Brown? In other words, as the defendant derives his interest in the lease for twenty-one years from the donor of the power, and as the plaintiff derives his reversionary interest from the same donor, what right can the former have to set up against the latter a lease granted to a third person by the tenant for life?

Upon a careful examination of the several cases which have been referred to, and which cases are collected in the last (the 6th) edition of Sugden on Powers (especially

Ren d. *Hall* v. *Bulkeley*, Doug. 292, *Goodright* v. *Cator*, Doug. 460, *Tyrrell* v. *Marsh*, 3 Bing. 31, 10 Moore, 305, and *Long* v. *Rankin*, Sugden on Powers, Appendix, No. 2), it will be found that they are all so much distinguished by their circumstances from the present, that no one of them affords an authority in point: it becomes necessary, therefore, to look at the principle upon which this case is to be decided; and upon principle we think that there has been no suspension of the leasing power given to the tenant for life so far as regards the grantee of the term under the power to demise by way of mortgage given to the executors; and upon that ground we think such grantor has the immediate reversion in him, and may sue upon the covenants in the lease.

Judgment for the plaintiff.

DOE *d.* BARNES *v.* FRANCIS ROE and Others.

Thursday, June 7th.

THIS was an action of ejectment brought to recover the possession of about twelve acres of freehold land

One C., who had agreed to purchase certain land of one H., contracted to convey the same to one W., who transferred his interest in the contract to Medley. Medley, in 1818, by settlement made on his marriage, covenanted, that, in case C. should be enabled to convey, he would pay C. 150*l.*, and procure the land to be conveyed to the trustees; with a proviso, that, if C. should not be enabled to convey, then no obligation or liability at law or in equity should attach on Medley to procure or to endeavour to procure a conveyance from any other person, or to pay the value of the same to the trustees by way of satisfaction for the same, nor should Medley in such case be precluded or disabled from purchasing the same for his own benefit. After the marriage had taken effect, viz. in June, 1818, Medley obtained a conveyance of the land from the trustees of H., the owner; and in February, 1819, by settlement, reciting the agreement to purchase, that C. had not been enabled to convey, that Medley had purchased of the owners, and that he was desirous to convey the land to the uses of his marriage settlement, conveyed the same to the trustees of such settlement accordingly:—Held, that, Medley being under no obligation either in law or equity to transfer the land in question, which he had, in consequence of the inability of C. to convey it, purchased of the trustees of H., without the intervention of C., such settlement, being made after marriage, was purely voluntary, and void as against a bonâ fide purchaser for a valuable consideration.

On the transfer of a mortgage, with an advance of an additional sum—Held, that an ad valorem stamp applicable to the additional advance is sufficient under the 3 Geo. 4, c. 117, s. 2, without any 1*l.* 15*s.* transfer stamp. *Sed quære.*

On the transfer of a mortgage for 10,000*l.*, with an additional advance of 4,000*l.*, it was proved that the 10,000*l.* were paid in bank-notes by the transferree to the original mortgagee by the direction and in the presence of the mortgagor, and the 4,000*l.* by a cheque to the mortgagor, as to which there was no proof that it was honoured:—Held, that the payment of the 10,000*l.* was a sufficient consideration as against one claiming under a voluntary settlement.

1838.

DOE d. BARNES v. ROE.

situate at Durley Moor, in the parish of Iver, in the county of Bucks.

The cause was tried before Bosanquet, J., at the last Assizes for Buckinghamshire. The lessor of the plaintiff claimed as mortgagee of a larger estate including the land in question. The defendants were trustees under a marriage settlement made by one William Medley. The facts were as follow:—

Indenture of Dec. 24, 1812:

By a deed bearing date the 24th December, 1812, reciting that, in December, 1804, Robert Higginson and others, executors of Richard Higginson, put up certain hereditaments for sale by auction, part of which (including the piece of land in question) was purchased by Charles Clowes; and that disputes had arisen between the parties respecting the sale, and a suit in equity was then pending between them; and that in consequence no conveyance had been made to Clowes—Clowes, for the considerations therein stated, covenanted with Whittington to convey the land in question to him within three months after the same should have been conveyed to him.

Clowes covenants to convey to Whittington.

Indentures of Dec. 17 and 18: 1816: Whittington to Medley and F. Roe.

By indentures of the 17th and 18th December, 1816, reciting that Medley had agreed with Whittington for the purchase of Mansfield farm (including the twelve acres in question), and that it was agreed that the said piece of land should be conveyed to Medley instead of to Whittington, the latter, at the request of Medley, thereby directed and appointed that the said piece of land should, when and as soon as Clowes should become enabled to convey the same, forthwith, or otherwise within three months next after Clowes should become so enabled to convey the same, be conveyed to Medley and Francis Roe in the place of Whittington.

Ante nuptial settlement—Feb. 26 and 27, 1818.

By indentures of the 26th and 27th February, 1818 (the marriage settlement), Medley directed and appointed that the said piece of land should, in case Clowes should be-

1838.

DOE d. BARNES v. ROE.

come enabled to convey the same, be conveyed to the trustees upon the trusts of the settlement; and Medley thereby covenanted with the trustees that he would (in case Clowes should become enabled to convey) cause and procure the same to be conveyed to them. Then followed a proviso, that, if Clowes should not be enabled to convey, then no obligation or liability at law or in equity should attach on Medley to procure or to endeavour to procure a conveyance from any other person, or to pay the value of the same to the trustees by way of satisfaction for the same, nor should Medley in such case be precluded or disabled from purchasing the same for his own benefit; anything to the contrary thereof in anywise notwithstanding; and a declaration that the trustees should stand possessed of the said piece of land upon trust for Medley until the marriage, thenceforth, during his life, or until he should become bankrupt, to permit him to receive the rents, and after his death or bankruptcy upon trust for the wife for her life, &c. &c.

Proviso.

By indentures of the 18th and 19th February, 1819, reciting the conditional covenant entered into by Medley, as above set forth, and that Clowes had not been enabled to make a valid conveyance of the land, and therefore Medley had contracted and agreed with the owners thereof (the trustees under the will of Higginson) for the sale of the same, with other hereditaments, to him, and accordingly, by indentures of the 8th and 9th June, 1818, the said piece of land was, with other hereditaments, conveyed unto and to the use of Medley, or to such person as he should appoint, and that Medley was desirous of conveying the said piece of land to the use of the defendants, upon the trusts of the settlement—for effectuating such desire, and in consideration of the premises, and in exercise of the power &c., Medley appointed the same unto and to the use of the trustees, upon the trusts of the settlement, and thereby conveyed the same to them.

Post-nuptial settlement—Feb. 18 and 19, 1819.

Indentures of June 8 and 9, 1818—conveyance from Higginson's trustees to Medley.

1838.

DOE d. BARNES v. ROE.

By indentures of the 24th and 25th January, 1831, reciting the conditional covenant of Medley to convey the land in question, and that Clowes was not able to convey the same, and the same had been purchased by Medley for his own use and benefit, of Higginson, as part of an estate called Gallows Hill Estate, a new trustee was appointed in lieu of one of the former trustees named in the settlement of the 18th and 19th February, 1819, and the hereditaments comprised in the settlement, and all other hereditaments &c. which the trustees were seised of or entitled to at law or in equity, or were legally or equitably subject to the trusts of the settlement, were conveyed to the present defendants, upon the trusts of the settlement.

Indentures of Jan. 24 and 25, 1831—conveyance to the present defendants.

The suit in equity alluded to in the deed of December 24, 1812, was on a bill filed in 1805 by the vendors against Clowes to compel a specific performance of the contract to purchase, which was dismissed by the Vice Chancellor in 1808. In 1808, Clowes filed a bill against the vendors, to compel a specific performance of the contract, which suit was heard in 1813, and the bill dismissed. Clowes appealed against this decision, but in 1817 withdrew his petition of appeal.

Clowes's title defective.

By indentures of the 27th and 28th January, 1823, Medley mortgaged the Gallows Hill Estate (including the twelve acres in question) to D'Aranda and Parker, for 10,000*l.* By indentures of the 2nd and 3rd April, 1828, reciting that Medley had applied to Ouvry, Whittle, and Hitchcock, for a loan of 10,000*l.* to pay off the mortgage to D'Aranda and Parker, and also for a further advance of 4,000*l.*, the premises comprised in the mortgage to D'Aranda and Parker were conveyed by D'Aranda and Parker and Medley to Ouvry, Whittle, and Hitchcock. And by indentures of the 15th and 16th April, 1830, Ouvry, Whittle, and Hitchcock, and Medley, conveyed the premises to the lessor of the plaintiff, Barnes, to secure an advance of 15,000*l.*

Jan. 27 and 28, 1823—mortgage to D'Aranda and Parker.

April 2 and 3—transfer of mortgage to Ouvry &c.

April 15 and 16, 1830—transfer of mortgage to Barnes.

It appeared that the mortgage from Medley to D'Aranda and Parker for 10,000*l.* was stamped with the proper ad valorem stamp; that the transfer to Ouvry, Whittle, and Hitchcock, was stamped with an ad valorem stamp applicable to the further advance of the 4,000*l.*, but not with a deed stamp; and that the transfer to Barnes, the lessor of the plaintiff bore a common deed stamp only.

Stamps.

The only proof of the payment of the 10,000*l.*, the consideration for the mortgage to D'Aranda and Parker, was the statement of that fact in the deed. Upon the first transfer of the mortgage the 10,000*l.* were paid by Ouvry to D'Aranda and Parker, by the direction and in the presence of Medley, in bank-notes, and for the 4,000*l.* a cheque was given to Medley. And upon the last occasion, a cheque was given by Barnes for the whole 15,000*l.*

Payment of consideration.

On the part of the lessor of the plaintiff, it was contended that the conveyance of the land in question to the trustees by the indentures of the 18th and 19th February, 1819, was voluntary, and consequently fraudulent and void as against a purchaser for valuable consideration. For the defendants, it was contended, that the ad valorem stamp on the 4,000*l.* additional advance, upon the second mortgage, was insufficient, there should have been a deed stamp also; and that there was no sufficient proof of the payment of the 4,000*l.* to make the lessor of the plaintiff a purchaser for valuable consideration.

Objections.

A verdict was taken for the plaintiff, subject to a motion to set it aside, and enter a nonsuit if the court should be of opinion that the plaintiff was not entitled to recover.

Biggs Andrews, in Michaelmas Term last, accordingly moved.—Three questions will arise in this case—first, whether or not the settlement made by William Medley after his marriage (of the 18th and 19th February, 1819) was voluntary under the statute 27 Eliz. c. 4, and void as against a purchaser for a valuable consideration—secondly,

1838.

DOE d. BARNES v. ROE.

whether, upon the transfer of the mortgage from D'Aranda and Parker to Ouvry, Whittle, and Hitchcock, a deed stamp of 1*l.* 15*s.* was necessary, in addition to the ad valorem stamp on the 4,000*l.* additional advance—thirdly, whether there was sufficient proof of the payment of that 4,000*l.*, to make the lessor of the plaintiff a purchaser for valuable consideration.

1. Settlement of Feb. 18 and 19, 1819, not voluntary.

1. The post-nuptial settlement made in 1819, was bonâ fide made in pursuance of the settlement made before the marriage, in 1818. Where there is no moral fraud in the transaction, the courts are always anxious to support deeds. In *Doe* d. *Hammerton* v. *Milton*, 2 Wils. 356, a mother's consenting that an annuity secured upon the whole of certain lands, should be charged upon a part only, was held to be a good consideration to support a limitation in a marriage settlement by way of remainder to the younger brothers of the intended husband, her eldest son, in preference to daughters of the marriage. In *Hill* v. *The Bishop of Exeter*, 2 Taunt. 69, the release of an adverse claim to a litigated estate, was held to be a good and valuable consideration in a deed, to avoid a former voluntary grant, by virtue of the statute 27 Eliz. c. 4; although the relessee was not party to the original suit, but came in by consent, and entered into an order of reference; and although he would not have been bound by the judgment in the original suit. And in *Ex parte Berry*, 19 Ves. 218, the surrender of a voluntary bond, void as against creditors, but valid as between the parties, was held to be a sufficient consideration to sustain a substituted bond against creditors, unless with a fraudulent design. Lord Eldon said: "If the transaction was tainted by any mala fides, if the design was to substitute a bond upon consideration in the room of a voluntary bond, it would not be effectual; but, if it was the result of the real, bonâ fide intention of the obligee to insist on payment, as the assignees could not have got back the money, had it been paid, I do not see how they can resist the proof upon such a change of the

security." Though the right of the trustees under the original settlement to enforce the conveyance in question might be doubtful, it would still be a sufficient consideration. The purchase from Higginson was virtually a performance of the contract with Clowes.

2. Stamps insufficient.

2. The transfer of the mortgage, of the 2nd and 3rd April, 1828, from D'Aranda and Parker to Ouvry, Whittle, and Hitchcock, in addition to the ad valorem stamp applicable to the 4,000*l.* additional advance, ought to have had 1*l.* 15*s.* deed stamp. Under the 55 Geo. 3, c. 184, sched. part 1, "Mortgage," the ad valorem duty must have been paid upon the whole 14,000*l.* But by 3 Geo. 4, c. 117, s. 2, it is provided, that, in lieu of the duties imposed by the 55 Geo. 3, c. 184. and 56 Geo. 3, c. 56, there shall be paid a duty of 1*l.* 15*s.* for the first, and 1*l.* 5*s.* for every subsequent skin, "upon any transfer, assignment, disposition, assignation, or re-conveyance of any mortgage, or of any other security in the said acts and the schedules thereto annexed in that respect severally mentioned, or of the benefit thereof, or of the money or stock thereby secured, provided no further sum of money or stock be added to the principal money or stock already secured;" "and if any further sum of money or stock shall be added to the principal money or stock already secured, the ad valorem duty on mortgages payable under the said recited acts respectively shall be charged only in respect of such further money or stock." There is nothing in this provision to exempt this deed from the transfer stamp. If the deed stamp were not necessary in such a case, the consequence would be, that, though a transfer of a mortgage without any additional advance would require a 1*l.* 15*s.* stamp, a 1*l.* stamp would suffice where there was an additional advance of 50*l.* This clearly could never have been intended. Besides, this is not a mere transfer of the original security; there is a distinct covenant on the part of the mortgagor to surrender the copyhold.

1838.

DOE d. BARNES v. ROE.

3. No legal evidence of the payment of the consideration.

3. The payment for the consideration for the mortgage was not sufficiently proved. There was nothing beyond the statement in the deed itself to shew the payment of the consideration for the mortgage to D'Aranda and Parker; and that, as between these parties, was not evidence—*Doe* d. *Sweetland* v. *Webber*, 3 N. & M. 586.—Upon the occasion of the transfer to Ouvry, Whittle, and Hitchcock, the 4,000*l.* was paid by a cheque; non constat that the cheque was honoured.

A rule nisi having been granted—

General remarks.

Wilde and *Storks*, Serjeants, and *Gunning*, in Hilary Term, shewed cause.—The circumstances out of which the questions in this case arise are briefly these:—In February, 1818, Medley, by articles of settlement anterior to his marriage, covenanted, amongst other things, in case he should become possessed of the property in question under a contract which he had entered into with one Clowes, to convey it to certain uses; with a proviso, that, unless he should become possessed under that contract, no obligation or liability at law or in equity should attach on him to procure or to endeavour to procure a conveyance from any other person, or to pay the value of the same to the trustees by way of satisfaction for the same; nor should he in such case be precluded or disabled from purchasing the same for his own benefit. Proceedings in Chancery were subsequently had in relation to this contract with Clowes; and it ultimately turned out that Clowes had no title, and could not convey. The event, therefore, upon which Medley's covenant was to attach never happened. In the month of June in the same year Medley obtained a conveyance of the property from the owners, Higginson's trustees; and, by a voluntary deed, in February, 1819, conveyed it to the uses of his marriage settlement. In January, 1823, Medley (without notice of the settlement) mortgaged this and other property to

1838.

Doe d. Barnes v. Roe.

D'Aranda and Parker for 10,000*l.* The mortgage deeds contained a covenant on the part of Medley to surrender certain copyholds. In April, 1828, this mortgage was transferred to Ouvry, Whittle, and Hitchcock, and an additional advance of 4,000*l.* obtained from them. This deed also contained the covenant to surrender the copyholds. And in April, 1830, there was a second transfer of the mortgage to Barnes, the lessor of the plaintiff, with an additional advance of 1,000*l.*

1. Settlement of Feb. 18 and 19, 1819, voluntary, and void as against a purchaser for a valuable consideration.

1. The settlement so made by Medley was clearly voluntary, and void as against a purchaser for a valuable consideration. He was under no obligation either legal or moral to make it, unless Clowes should be in a situation to convey to him. Whether or not a settlement is voluntary, must in each case depend upon its own circumstances. After the case of *Doe* d. *Otley* v. *Manning*, 9 East, 59, there can be no dispute as to the general principle. It was there held that a voluntary settlement of lands, made in consideration of natural love and affection, is void as against a subsequent purchaser for a valuable consideration, though with notice of the prior settlement before all the purchase money was paid or the deeds executed, and though the settlor had other property at the time of such prior settlement, and did not appear to be then indebted, and there was no fraud in fact in the transaction; for, the law, which is in all cases the judge of fraud and covin arising out of facts and intents, infers fraud in such case, upon the construction of the statute 27 Eliz. c. 4. "Much property," says Lord Ellenborough, "has no doubt been purchased, and many conveyances settled upon the ground of its having been so repeatedly held that a voluntary conveyance is fraudulent, within the statute 27 Eliz.: and it is no new thing for the court to hold itself concluded in matters respecting real property by former decisions upon questions in respect of which, if it were res integra, they would probably have come to very different conclusions." In a case

1838.

Doe d. Barnes v. Roe.

like this the court can feel no anxiety to sustain the settlement: where purchasers have been deceived and deluded into the payment of large sums, they will at least hold an even hand. There was neither colour of claim, nor claim in fact, to give rise to any legal consideration for this settlement.

2. Stamps sufficient.

2. The stamp on the mortgage of April, 1828, was sufficient. Where the deed is a mere assignment or transfer of a mortgage security, a 1*l.* 15*s.* stamp is required: where the instrument is not only a transfer or assignment of an existing mortgage, but also made to secure an additional advance, the statute imposes an ad valorem duty upon such additional advance: but the statute in neither case requires both the ad valorem and the deed stamp. Such is the construction put upon the 3 Geo. 4, c. 117, s. 2, in *Doe* d. *Bartley* v. *Gray*, 4 N. & M. 719, 3 Ad. & E. 89, where Lord Denman, delivering the judgment of the court of King's Bench, says: "It is observable that by this act the transfer duty of 1*l.* 15*s.* is imposed with the same proviso as was contained in the 55 Geo. 3; and we think that the effect is the same, viz. that the transfer duty is imposed in those cases only where no further sum of money is added." If the matter were doubtful, the subject would have the benefit of the doubt; for, a burthen is never imposed by inference or implication. The covenant to surrender the copyholds makes no difference: such a covenant is always inserted with a view to create a privity between the original mortgagor and the last mortgagee or transferree.

3. Payment of consideration well proved.

3. The payment of the 10,000*l.* by Ouvry to D'Aranda and Parker, by the direction of Medley and in his presence, made Ouvry, Whittle, and Hitchcock purchasers for a valuable consideration: and therefore it was wholly unnecessary to shew how the consideration was paid by Barnes. [*Tindal*, C. J.—If any one conveyance for valuable consideration was proved to have been made subsequently to the settlement, that is enough.]

1838.

DOE d. BARNES v. ROE.

Andrews, in support of his rule.—1. It is incumbent on the party seeking to avoid the deed, to shew it to be voluntary and fraudulent within the statute. The effect of the deed of December, 1816, was, to place Medley in the condition that Whittington stood in under the deed of December, 1812. At that time Medley had a right to compel Clowes to convey the land in question to him; and by the settlement of 1818 the trustees were clothed with all the rights enjoyed by Medley. Whether Clowes was able to convey or not, makes no difference: the release by the trustees of their rights as against Clowes (which they in effect have done) was clearly sufficient to prevent the settlement from being voluntary. [*Tindal*, C. J.—The recitals in the settlement of 1819 shew that the circumstances contemplated by the former settlement had arisen: how can the trustees be permitted in a court of justice to gainsay those recitals?] The giving up a claim, whether well or ill founded, is a sufficient consideration. [*Bosanquet*, J.—Was this a disputable claim? Had either Medley or the trustees any claim at all upon Clowes?] *Roe* d. *Hamerton* v. *Mitton*, 2 Wils. 356, shews how small a consideration will support a settlement.

1. Settlement not voluntary.

2. A reference to the statute 3 Geo. 4, c. 117, s. 2, will clearly shew that the deed in question was liable to the transfer duty of 1*l.* 15*s.* as well as to the ad valorem duty on the additional advance. The question did not arise in *Doe* d. *Bartley* v. *Gray*. Lord Denman there says, 4 N. & M. 723; "Whether a common deed stamp also was necessary, under either of the acts, it is not material to inquire, because the 1*l.* 15*s.* stamp, though it may have been *erroneously* put on these deeds, was at all events *sufficient*."

2. Stamps not sufficient.

3. The payment of the consideration for the original mortgage and the first transfer, for the reasons already urged, was not sufficiently proved.

3. Consideration not proved.

Cur. adv. vult.

1838.

DOE d. BARNES v. ROE.

TINDAL, C. J., delivered the judgment of the court:—

This was an ejectment brought to recover about twelve acres of land in the parish of Iver, in the county of Bucks, upon the demise of John Barnes, who claimed title as assignee of a mortgage granted in 1823 by William Medley, the mortgagor, to one Benjamin D'Aranda and his trustee.

Contract by Clowes with Higginson's trustees,

It appeared that one Richard Higginson having by his will, made in 1798, devised his real estate, of which the premises in question formed part, to trustees for the purposes of sale, and who afterwards died, one Clowes had agreed for the purchase of the land in question at a sale by public auction. But, disputes having arisen respecting the timber, the trustees, in 1805, filed a bill against Clowes for a specific performance, which bill was dismissed in July, 1808. In November, 1808, Clowes in his turn filed a bill against the trustees for a specific performance, which bill was dismissed in 1813. From this order of dismissal Clowes appealed, but afterwards had liberty to withdraw his appeal. In the meantime, Clowes, in 1812, sold his interest to one Whittington; and in 1816 Whittington sold his interest to William Medley.

by Clowes with Whittington, and by him with Medley.

Ante-nuptial settlement.

In February, 1818, Medley, by settlement made before marriage, reciting the agreement with Whittington, directed and appointed that the land in question, in case the marriage should take effect, and Clowes should be enabled to convey, should be conveyed and assured to the use of the trustees of the marriage settlement; and covenanted, that, in case Clowes should be enabled to convey, he would pay to Clowes 150*l*., and procure the piece of land to be conveyed to the trustees; with a proviso, that, if Clowes should not be enabled to make such conveyance or assurance of such piece of land as aforesaid, then and in such case no obligation or liability at law or in equity should attach on him Medley, his heirs, executors, or administrators, to procure or endeavour to procure a conveyance from any other person, or to pay the value of the

Proviso.

same, or the said sum of 150*l.*, to the trustees by way of satisfaction for the said hereditaments, nor should Medley, his heirs, executors, or administrators, be precluded from or disabled from purchasing the same for his or their own benefit, any thing to the contrary notwithstanding.

After the marriage had taken effect, viz. in June, 1818, Medley obtained a conveyance of the land from the trustees of Higginson, the owner; and, in February, 1819, by settlement, reciting the agreement to purchase, that Clowes, had not been enabled to convey, that Medley had purchased of the owners, and that he was desirous to convey the land to the uses of his marriage settlement, conveyed the same to the trustees of such settlement accordingly.

Conveyance from Higginson's trustees to Medley.

Post-nuptial settlement.

In January, 1823, Medley mortgaged the land in question (amongst other premises) to Benjamin D'Aranda and his trustee, in fee, as a security for 10,000*l.*

First mortgage.

In April, 1828, in consideration of the payment of 10,000*l.* to D'Aranda, and of a further sum of 4,000*l.* to Medley, by way of further charge, the premises were conveyed to Ouvry and others, and by them, in 1830, further conveyed to Barnes, the lessor of the plaintiff.

Transfers.

The original mortgage for 10,000*l.* was stamped with an ad valorem stamp applicable to that amount, the transfer to Ouvry and others with an ad valorem stamp applicable only to 4,000*l.*, and the transfer to Barnes with a deed stamp of 1*l.* 15*s.* only.

Stamps.

Payment of 10,000*l.* in bank-notes upon the transfer from D'Aranda to Ouvry and others, in the presence of Medley, was proved: but an objection was made at the trial, that the payment of the 4,000*l.* to Medley was not proved, the witness to prove the payment being only able to say that a cheque was given.

Payment of consideration on the second transfer.

Upon this state of facts, three questions were raised—first, whether the settlement by Medley after his marriage was voluntary—secondly, whether the transfer of the mortgage to Ouvry required a deed stamp of 1*l.* 15*s.* in ad-

1838.

DOE d. BARNES v. ROE.

dition to the ad valorem stamp for 4,000*l.*—thirdly, whether there was sufficient proof that Barnes, the lessor of the plaintiff, was a purchaser for a valuable consideration.

2. As to the sufficiency of the stamps.

The second point, which relates to the stamp, has been already decided by the case of *Doe* d. *Bartley* v. *Gray*, 3 Ad. & E. 89, 4 N. & M. 719, by which it was determined, that, according to the true construction of the 3 Geo. 4, c. 117, where a mortgage term is transferred upon a further advance of money, an ad valorem stamp upon such advance is sufficient, without the addition of any deed stamp in respect of the transfer of the original mortgage (30).

(30) In Doe d. Bartley v. Gray, 4 N. & M. 719, 3 Ad. & E. 89, the transfer duty of 1*l.* 15*s.* was impressed upon the deed, and therefore this precise question did not arise. But the court expressed a distinct opinion that the transfer duty was imposed by the statute 3 Geo. 4, c. 117, s. 2, "in those cases only where no further sum of money is added." The point decided in that case was, that, upon a deed of transfer and further charge, containing also an additional security made by the mortgagor, no *new ad valorem* duty is payable in respect of the original debt.

The statute 3 Geo. 4, c. 117, is confined to transfers of mortgages: the case of a *further security* for an existing debt is regulated by the provision of the general stamp act, 55 Geo. 3, c. 184, Sched. part 1, title Mortgage. And it was decided in Lant v. Peace, 3 N. & P. 329, that, where a deed of transfer and further charge contained also a further security for the original debt, a *deed stamp* of 1*l.* 15*s.* *in respect of the further security* was necessary, in addition to the ad valorem duty on the further charge. There the original mortgage was for 400*l.* Upon the transfer an additional sum of 1000*l.* was advanced. The deed was stamped with the ad valorem duty of 5*l.* in respect of the additional 1000*l.*, and also with a 1*l.* 15*s.* stamp on the first, and the progressive duty of 1*l.* on each of the three following skins. At the trial it was discovered that the deed contained too many words for the stamps impressed upon it. The plaintiff, however, contended that the deed stamp of 1*l.* 15*s.* was unnecessary, and that it might be applied to make up the deficiency in the other stamps. Lord Denman said: "In this case it is conceded that sufficient ad valorem duty has been paid on this instrument, if the 1*l.* 15*s.* stamp, which was im-

1838.

Doe d. Barnes v. Roe.

3. As to the proof of payment of the consideration.

With respect to the third point, the payment of 10,000*l.* in bank-notes to D'Aranda, upon the transfer to Ouvry and others, under whom Barnes, the lessor of the plaintiff, claims, is sufficient to make him a purchaser for valuable consideration, whether the additional 4,000*l.* was or was not actually paid to Medley. Upon these two points, the opinion of the court was intimated whilst the case was under discussion.

On the first point, the court expressed a wish to look at the deeds: and, upon examination of these, it very clearly appears to us that Medley was under no obligation either in law or equity to transfer to the trustees of his marriage settlement the land which, in consequence of the inability of Clowes to convey it, he had purchased of the trustees of Higginson, the original owner, without the intervention of Clowes: and, consequently, such settlement, being made

pressed for another purpose, can be taken into account. It is contended that this stamp can be so applied, because in the clause containing exemptions from the ad valorem duty on mortgages &c., there is enumerated, any deed made as an additional or further security, which shall have paid the ad valorem duty, which is the case with respect to the 400*l.* But that exemption in the schedule is expressed only to be in respect of the ad valorem duty, 'but not from any other duty to which the same may be liable'— 55 Geo. 3, c. 184, Sched. part 1, *Mortgage. A deed stamp is a duty to which a deed for further security is liable;* the argument therefore fails." And Patteson, J., said: "I feel no doubt upon the question, on looking at the terms of the title of what is called the exemption clause. It professes to exempt certain deeds which have paid the ad valorem duty, from payment of that duty only. This deed, with respect to the 400*l.*, comes within the exemption, because the duty had been paid upon that sum; then a further sum of 1000*l.* is advanced, upon which the ad valorem duty is payable; and the question is, whether the mortgage stamp paid upon that sum renders any further stamp on the 400*l.* unnecessary. There is nothing in the act to shew that there is any such exemption, and Doe d. Bartley v. Gray, 4 N. & M. 719, 3 Ad. & E. 89, does not touch the question, for that case depended entirely on the peculiar words of 3 Geo. 4, c. 117, with respect to the transfer duty, and this point did not arise."

1838.

Doe d. Barnes v. Roe.

after marriage, was purely voluntary, and void against a bonâ fide purchaser for a valuable consideration (31).

We therefore think the rule for setting aside the verdict for the plaintiff, and entering a nonsuit, should be discharged.

Rule discharged.

(31) Whether a post-nuptial settlement made by a husband upon the wife at the instance of his wife's friends, she having at the time of her marriage been entitled to legacies which were then in the hands of executors, and one of which continued to be so at the time of the settlement, is or is not a fraudulent conveyance within the statute 27 Eliz. c. 4, so as to be void as against creditors and subsequent purchasers for value—quære. Doe d. Sweetland v. Webber, 3 N. & M. 586.

Wilson *v.* Wilson and Wilson *v.* Steel. Wilson *v.* Butler, Wilson *v.* Lillie (Bart.), Wilson *v.* Perring, and Wilson *v.* Howell.

Wednesday, June 13th.

Certain of the shareholders in an unsuccessful joint-stock company, for their mutual protection and indemnity against the claims of the company's creditors, entered into an arrangement by deed, under which a committee of four was appointed, with power and authority (amongst other things) to settle all debts &c., and to wind up the affairs of the company. The parties executing this deed paid each 25*l.*, and also such calls upon their respective shares as remained unpaid (which was to form a primary fund for the payment of the debts &c. due from the company), and covenanted to contribute and pay, in equal shares and proportions, all sums of money which might from time to time be required, in addition to the primary fund, for the payment or satisfaction of all or any of the debts, sums of money, bills of exchange, interest, bills of costs, salaries, costs, charges, and expenses due from the company, within ten days after demand, to a trustee named in the deed: and it was provided that the certificate for the time being of the committee, or the major part of them, of the sums and proportions required, should be *conclusive evidence* that the money was required, and of the proportion which each person was to pay. In pursuance of this deed, the committee certified that a sum of 5,100*l.* was required, in aid of and in addition to the primary fund, for the payment of debts &c., and that 150*l.* was the proportion payable by each of the parties to the deed. Some of the parties paid the 150*l.*, others did not. To meet the urgent demands upon them, their funds being exhausted, the committee themselves advanced large sums, and procured voluntary advances from other parties to the deed. 3,939*l.* 0*s.* 4*d.* remaining due of the debts and demands provided for by the deed, and advances having been made to various amounts by several of the parties to the deed, under the former certificate and otherwise, amounting in the whole to 14,046*l.* 19*s.* 8*d.*, the committee, conceiving it to be the best mode of making an equitable adjustment, made a second certificate declaring that 17,986*l.* was required for payment of some of the debts &c. made

THESE were actions of covenant. The declaration in each stated, that theretofore, to wit, on the 28th July, 1827,

1838.

WILSON v. WILSON.

by a certain indenture then made between John Plummer, Rowland Stephenson, George Trower, and John Dunston, of the first part, the several other persons who had executed the said indenture, except the plaintiff, viz. the defendant [and twenty-nine other persons, naming them], of the second part, and the plaintiff, of the third part, [profert], after reciting—that an association, under the denomination of The Imperial Distillery Company, had been some time then ago formed or attempted to be formed for the distillation of British spirits, and that a contract had been entered into by and in the names of three persons who were or assumed to be directors of the said association or intended association, for the purchase of buildings and of ground and other premises, and plant of trade, fixtures, and other effects at Stanstead Common, Hertfordshire, for the purpose of carrying on the business of the association or intended association, and that the sum of 15,000*l.*, or some other sum not exceeding 15,000*l.*, part of the purchase money, was still unpaid, and that there was interest due thereon—that the said association or intended association, so far as the same ever had existence, was then at an end, and that the said undertaking and the objects thereof had been entirely given up and abandoned

Recitals—Formation of the company.

Contract for premises at Stanstead.

Undertaking abandoned.

payable by the deed, and that 529*l.* was the proportion payable by each of the parties. The letter accompanying this certificate and demand, contained a postscript informing those who had made advances under the former certificate or otherwise, that the sums so advanced by them would be set off against the sum then demanded.

In an action upon the deed, to recover the 529*l.* made payable by the last mentioned certificate, the declaration contained an averment "that the major part of the members of the committee did, by writing under their hands, and in execution of the powers and authorities by the indenture vested in them, certify, *as the fact was*, that 17,986*l.* was then required for the payment of the debts &c., and that 529*l.* was the proportion which each of the parties was to pay." The defendant pleaded that the major part of the members of the committee did not certify as the fact was, nor *was it the fact*, that 17,986*l.* was then required &c.:—Held, that the certificate was inconsistent with the facts proved; that the defendant was not estopped from contesting it, the truth of the certificate being put in issue by the plaintiff himself; and that the objection was equally available to those parties to the deed who had not contributed anything as to those that had.

But, held, that the above facts did not sustain a plea that the committee, "well knowing the premises, fraudulently and deceitfully signed the certificate, with intent to defraud the defendant and others."

The deed contained a proviso, that, in case any member of the committee should die, or decline or desire to be discharged from acting, or become incapable to act as a member of the committee, the others should have power to nominate another in his stead. One of the committee absconded to America under circumstances strongly evidencing an intention not to return:—Ruled, by Tindal, C. J., that he thereby became incapable to act, within the meaning of the deed.

Scrip taken.

That certain shareholders refused to pay calls or to sign the deed;

—that divers persons became or agreed or intended to become subscribers of or for certain numbers of shares of the capital intended to be raised for the said association or intended association, and paid the first instalment or deposit of 5*l.* per share upon the shares so subscribed for; but several of those persons refused to pay any further instalment or call upon such shares, or to execute the deed of settlement of the said association or intended association; and that it was insisted by and on the part of the persons who so refused (including such of them as were parties to the said indenture) that they never were partners in the said association or intended association, and that the partnership, so far as they were concerned, never existed, but was merely negotiated for, and that they had not incurred any liability in respect of the debts or concerns of the said association or intended association—that the several persons parties to the said indenture of the first and second parts had severally become or agreed or intended to become subscribers of or for certain numbers of shares in the said association or intended association, and some of them had paid into the hands of the bankers or treasurers of the said association or intended association the first instalment or deposit of 5*l.* per share on the shares for which they had subscribed, but had refused to pay the second and third instalments called for by the directors, or persons assuming to act as directors of the said association or intended association, of 5*l.* each per share therein; that others of them had paid the first and second, but refused to pay the third instalment or call; and that others had paid the three instalments or calls—that all the money so paid by the said parties to the said indenture, as well as all the monies paid by the other subscribers or shareholders of the said association or intended association into the hands of the treasurers or bankers, had been expended by or under the direction of the persons who acted or assumed to act on behalf of the said association or intended association in the capacity of directors thereof, or some of

that others had paid calls;

that the funds were exhausted;

1838.

WILSON v. WILSON.

formed into a committee for the purpose of determining upon and carrying into effect such measures as they might deem advisable for obtaining such contributions, or compelling the persons who might refuse to come forward with their contributions for the purposes aforesaid to pay the debts of the said association or intended association; and that they had accordingly employed a person as their clerk, and had employed the said Messrs. Swain & Co. as their attornies to assist them in carrying such measures into effect; and that they had already adopted some measures, and intended to adopt other measures, for the purposes last mentioned, and for the liquidating the debts and winding up the concerns of the said association or intended association—that the said members of the committee had signed and given guarantees or securities to several creditors of the said association or intended association, and that they intended to give guarantees or securities to other creditors or claimants, for payment of the debts due or claimed to be due to them respectively, and interest thereon, and certain costs and expenses, as an inducement to them respectively to assist in carrying some of the aforesaid measures into effect by bringing their actions for their demands against divers persons who were or had been subscribers or shareholders of the said association or intended association; and that it was intended that such actions should include some of the persons parties to the said indenture of the first and second parts; but that it might happen that the said actions might fail on the ground alleged by some of the said persons who became or agreed or intended to become subscribers, that the said partnership, so far as they were concerned, never existed, or that the said actions or some of them might fail for other reasons, and by such failure heavy costs and expenses would be incurred; and the said committee, in consequence of such guarantees or securities as aforesaid, might be liable to pay them—that

who had given guarantees to creditors;

that the com-

1838.

WILSON v. WILSON.

to the reciting deed had agreed to contribute as after mentioned.

persons parties to the said indenture of the first and second parts, as well for indemnifying and reimbursing the said committee in respect of the several guarantees, securities, and indemnities, payments, liabilities, and other measures, matters, and things in the said indenture before mentioned or referred to, as for the mutual protection and indemnity of the said several persons parties thereto of the first and second parts against the debts and liabilities of the said association or intended association, had respectively agreed to contribute such sums of money and enter into such covenants and agreements respectively as were in the said indenture after mentioned—that the principle of contribution agreed upon by the said persons parties to the said indenture of the first and second parts, was, that such of them as had not already paid up the second and third calls or instalments of *5l.* each per share on the shares for which they respectively were subscribers, should in the first instance pay a sum of money equal to such unpaid calls or instalments, and that each of the said several persons parties to the said indenture of the first and second parts should pay the sum of *25l.* as a further contribution; and that the several sums of money so to be paid should, with the other monies to be received or obtained by way of contribution from any of the other subscribers or shareholders of the said association or intended association, and with the monies (if any) which might be received for or on account of the proceeds of the sale of the said distillery premises, plant and fixtures, and other property and effects of the said association or intended association in the same premises, constitute and be the primary fund for liquidating the debts and winding up the concerns of the said association or intended association, and for answering the purposes in the said indenture before and after mentioned; and that they the said several persons parties to the said indenture of the first and second parts respectively, and their respective executors

Principle of contribution.

Calls to be paid, and 25*l.* by each party to the deed.

Primary fund.

1838.

WILSON v. WILSON.

—that divers persons became or agreed or intended to become subscribers of or for certain numbers of shares of the capital intended to be raised for the said association or intended association, and paid the first instalment or deposit of 5*l.* per share upon the shares so subscribed for; but several of those persons refused to pay any further instalment or call upon such shares, or to execute the deed of settlement of the said association or intended association; and that it was insisted by and on the part of the persons who so refused (including such of them as were parties to the said indenture) that they never were partners in the said association or intended association, and that the partnership, so far as they were concerned, never existed, but was merely negotiated for, and that they had not incurred any liability in respect of the debts or concerns of the said association or intended association—that the several persons parties to the said indenture of the first and second parts had severally become or agreed or intended to become subscribers of or for certain numbers of shares in the said association or intended association, and some of them had paid into the hands of the bankers or treasurers of the said association or intended association the first instalment or deposit of 5*l.* per share on the shares for which they had subscribed, but had refused to pay the second and third instalments called for by the directors, or persons assuming to act as directors of the said association or intended association, of 5*l.* each per share therein; that others of them had paid the first and second, but refused to pay the third instalment or call; and that others had paid the three instalments or calls—that all the money so paid by the said parties to the said indenture, as well as all the monies paid by the other subscribers or shareholders of the said association or intended association into the hands of the treasurers or bankers, had been expended by or under the direction of the persons who acted or assumed to act on behalf of the said association or intended association in the capacity of directors thereof, or some of

Scrip taken.

That certain shareholders refused to pay calls or to sign the deed;

that others had paid calls;

that the funds were exhausted;

1838.

WILSON v. WILSON.

them—that divers debts and liabilities contracted or incurred in the name or on the account of the said association or intended association, by persons who acted or assumed to act on behalf of the said association or intended association were still owing and outstanding—that Rowland Stephenson was an original subscriber of or for one hundred shares, and J. H. Knibbs, in his own name, and at the request of, and as a trustee for Stephenson, had executed the deed of settlement of the said association or intended association, for or in respect of those one hundred shares —that, since the 21st November then last past, several persons, being or claiming to be creditors of the said association or intended association, had brought actions at law, and others had threatened to bring actions against Knibbs and the persons parties to the said indenture of the first part, or some or one of them, either alone or jointly with some other person or persons, to recover the debts or sums of money due or claimed to be due to such creditors or claimants respectively, and that Messrs. Swain & Co. had been employed as attornies to defend the said actions—that other persons, being or claiming to be creditors of the said association or intended association, had since the 21st November then last applied to the said persons parties to the said indenture of the first and second parts, or some or one of them, for payment of the debts or sums of money due or claimed to be due to such creditors or claimants respectively—that it was admitted to be just that the debts and liabilities of the said association or intended association should be paid and satisfied, and that other persons who were or had been subscribers or shareholders of the said association or intended association should, as well as the persons parties to the said indenture, contribute towards the funds necessary for paying and satisfying all the debts and liabilities and winding up the concerns thereof; and the said persons parties to the said indenture of the first part had been some time ago

that debts were outstanding;

that Knibbs was trustee for R. Stephenson for 100 shares, and had signed the deed;

that actions had been brought and threatened;

that it was deemed advisable to raise a fund for paying the debts, &c.;

that a committee had been formed,

1838.

WILSON v. WILSON.

formed into a committee for the purpose of determining upon and carrying into effect such measures as they might deem advisable for obtaining such contributions, or compelling the persons who might refuse to come forward with their contributions for the purposes aforesaid to pay the debts of the said association or intended association; and that they had accordingly employed a person as their clerk, and had employed the said Messrs. Swain & Co. as their attornies to assist them in carrying such measures into effect; and that they had already adopted some measures, and intended to adopt other measures, for the purposes last mentioned, and for the liquidating the debts and winding up the concerns of the said association or intended association—that the said members of the committee had signed and given guarantees or securities to several creditors of the said association or intended association, and that they intended to give guarantees or securities to other creditors or claimants, for payment of the debts due or claimed to be due to them respectively, and interest thereon, and certain costs and expenses, as an inducement to them respectively to assist in carrying some of the aforesaid measures into effect by bringing their actions for their demands against divers persons who were or had been subscribers or shareholders of the said association or intended association; and that it was intended that such actions should include some of the persons parties to the said indenture of the first and second parts; but that it might happen that the said actions might fail on the ground alleged by some of the said persons who became or agreed or intended to become subscribers, that the said partnership, so far as they were concerned, never existed, or that the said actions or some of them might fail for other reasons, and by such failure heavy costs and expenses would be incurred; and the said committee, in consequence of such guarantees or securities as aforesaid, might be liable to pay them—that

who had given guarantees to creditors;

that the com-

1838.

WILSON v. WILSON.

the said committee had received several sums of money from subscribers of or for shares in the said association or intended association, as the respective contributions of such persons for the purposes aforesaid, and had given such last-mentioned persons respectively indemnities against all farther claims, demands, actions, suits, costs, and expenses whatsoever by reason or in consequence of their having been subscribers for those shares respectively in the said association or intended association, and that they expected to receive other monies from other subscribers as their respective contributions for the purposes aforesaid, and in that case they intended to give the last-mentioned persons indemnities similar or to the like effect, though in some respects they might vary from those which were lastly in the said indenture before mentioned—that the said committee had already employed a person to survey and value the said distillery, buildings, ground, and premises at Stanstead, and the plant and fixtures, and the other property and effects of the said association or intended association therein, and that it was probable that they might direct or consent to the sale of the same, and enter into arrangements with the vendor of the said distillery premises and plant, and with the persons in whose name the same were purchased, respecting the sale thereof, the buying in of the same, the application of the proceeds of such sale, the abandonment of the contract with the person of whom the same were purchased as aforesaid, for the purchase thereof, and the payment or satisfaction or release of the balance of the said purchase money, and the interest thereof, and the costs of a Chancery suit instituted by the vendor against the nominal purchasers—that the said committee had already paid several sums of money, and incurred and become liable for divers expenses for defending the said actions and otherwise in and about the premises; and that it was probable that they might incur other expenses in and about the matters aforesaid—that the said several

mittee had received sums from subscribers;

that the premises at Stanstead had been valued;

that expenses had already been incurred;

that the parties

1838.

WILSON v. WILSON.

persons parties to the said indenture of the first and second parts, as well for indemnifying and reimbursing the said committee in respect of the several guarantees, securities, and indemnities, payments, liabilities, and other measures, matters, and things in the said indenture before mentioned or referred to, as for the mutual protection and indemnity of the said several persons parties thereto of the first and second parts against the debts and liabilities of the said association or intended association, had respectively agreed to contribute such sums of money and enter into such covenants and agreements respectively as were in the said indenture after mentioned—that the principle of contribution agreed upon by the said persons parties to the said indenture of the first and second parts, was, that such of them as had not already paid up the second and third calls or instalments of 5*l.* each per share on the shares for which they respectively were subscribers, should in the first instance pay a sum of money equal to such unpaid calls or instalments, and that each of the said several persons parties to the said indenture of the first and second parts should pay the sum of 25*l.* as a further contribution; and that the several sums of money so to be paid should, with the other monies to be received or obtained by way of contribution from any of the other subscribers or shareholders of the said association or intended association, and with the monies (if any) which might be received for or on account of the proceeds of the sale of the said distillery premises, plant and fixtures, and other property and effects of the said association or intended association in the same premises, constitute and be the primary fund for liquidating the debts and winding up the concerns of the said association or intended association, and for answering the purposes in the said indenture before and after mentioned; and that they the said several persons parties to the said indenture of the first and second parts respectively, and their respective executors

to the reciting deed had agreed to contribute as after mentioned.

Principle of contribution.

Calls to be paid, and 25*l.* by each party to the deed.

Primary fund.

1838.

WILSON v. WILSON.

and administrators, should contribute and pay in equal proportions all other monies which should be required for those several purposes—that such of the said several persons parties to the said indenture of the first and second parts as had previously paid up the said second and third calls or instalments, had before the execution of the said indenture by them respectively paid to the said persons parties to the said indenture of the first part, as such committee as aforesaid, sums of money equal to the unpaid calls or instalments on the shares for which they respectively were subscribers as aforesaid, and each of the said several persons parties to the said indenture of the first and second parts had also before the execution of the said indenture by him paid to the said persons parties thereto of the first part as such committee as aforesaid, the further sum of 25*l.*, and that all the said sums of money so paid to the said committee had been paid by them into the banking-house of Messrs. Remington, Stephenson, & Co., in Lombard Street, in the joint names of the said Plummer, Stephenson, and Trower—that it was meant and intended that each of the persons parties to the said indenture of the first and second parts should be liable, for any breach of any of the covenants therein contained on his part to be performed and fulfilled, to an action at the suit of the said John Wilson as trustee as thereinafter mentioned—It was by the said indenture witnessed, that, in pursuance and consideration of the premises, and also in consideration of the covenants thereinafter contained to be entered into by them the said several persons parties thereto of the first and second parts mutually and reciprocally, each of them the said several persons parties to the said indenture of the first and second parts, so far as related to the observance and performance by him, his heirs, executors, and administators, of the covenants and agreements thereinafter contained on his and their part to be observed and performed, and not further or otherwise, did by the said in-

Actions for breaches of covenant to be brought by John Wilson as trustee.

Covenants.

1838.

WILSON v. WILSON.

denture separately for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the plaintiff, his executors and administrators, as trustee for the persons intended to be benefited by the covenants thereinafter contained, according to their rights and interests under the same covenants, in manner following, viz.

1. Committee named.

First, that the said Plummer, Stephenson, Trower, and John Dunston, should, except as was thereinafter provided, be continued and be a committee on behalf of themselves and the several other persons parties to the said indenture of the second part, for the purposes thereinmentioned, and should have and were thereby invested with full power and authority to continue and carry into effect the measures already adopted by them, or measures similar to and with or without variation from those already adopted by them, and to determine upon and carry into effect all such other measures as they might deem advisable or expedient for liquidating the debts and winding up the concerns of the said association or intended association, and for other purposes; and also with other powers and authorities in the said indenture respectively mentioned—Secondly, that Plummer, Stephenson, Trower, and Dunston, and the survivors and survivor of them, should have *power to add one, two, or more of the persons parties to the said indenture of the second part to their number, and form with them the committee* for the purposes and with the powers and authorities aforesaid; but that the addition or not of any other person or persons to their number was to be wholly at their option or discretion—Thirdly, that, *whenever any of the persons who were or for the time being should form the committee, should* die, or desire to be discharged from acting, or decline or *become incapable to act*, the other persons who for the time being should be members of *the committee*, should have power, by memorandum in writing under their hands, *to nominate another* of the persons parties to the said inden-

Their powers.

2. Committee impowered to add to their number.

3. New member of committee to be nominated in lieu of one dying &c.

1838.

WILSON v. WILSON.

ture of the second part *to be one of the said committee in his place and stead*, and so from time to time—Fourthly, that the major part in number of the persons who for the time being should compose the committee should have power to act and decide in all cases, and such decision should be as binding and effectual as if all the members of the committee had joined—Sixthly, that the said several sums of money already paid by the said several persons parties to the said indenture to the said committee as aforesaid, and the several other sums of money already received and thereafter to be received by the said persons parties to the said indenture of the first part, or the committee for the time being, from the other subscribers or shareholders of the said association or intended association, as the contributions or compensations of such other subscribers or shareholders, for the purposes aforesaid, and any monies that might be received by the committtee for the time being for or on account of the proceeds of the sale of the said distillery premises, plant and fixtures, and other property and effects of the said association or intended association, should form and be the primary fund for answering and paying, and should accordingly in the first instance be applied in or towards paying or satisfying the several debts, sums of money, and bills of exchange due or claimed to be due from or on account of the said association or intended association, which the said persons parties to the said indenture of the first part had already guaranteed or secured, or agreed to pay, or which they or the committee for the time being might guarantee or secure or agree to pay, and all interest which had been or might be secured or agreed to be paid for or in respect of the same; and also all other debts and sums of money due or owing, or claimed or to be claimed to be due or owing from or on account of the said association or intended association, which the persons to whom the same respectively were due or claimed to be due might by action or suit

4. Decision of major part to be binding.

6. Primary fund.

Application thereof.

1838.

WILSON v. WILSON.

thereafter compel any of the persons parties to the said indenture of the first and second parts, or the said J. H. Knibbs in respect of the one hundred shares for which he executed the said deed of settlement as aforesaid, or any of the other subscribers or shareholders to whom the said persons parties to the said indenture of the first part, or they, or the committee for the time being, had given or might give indemnities as aforesaid, or the respective heirs, executors, or administrators of the said several persons, to pay by reason or in consequence of their respectively being or having been subscribers, shareholders, or partners of or in the said association or intended association; and also the salary of the clerk for the time being employed or to be employed by the said persons parties to the said indenture of the first part, or by them or the committee for the time being, to assist them in winding up the concerns of the said association or intended association; and also the bills of costs of the said Messrs. Swain & Co., or other attornies or solicitors for the time being of the committee, for defending the said actions and suits which had already been brought as aforesaid, and for advising and assisting the committee with reference to the debts and concerns of the said association or intended association, and the measures for obtaining contribution as aforesaid, and winding up the said concerns, and all other bills of costs of the said Messrs. Swain & Co., or of any other attornies or solicitors whom the committee for the time being might employ for defending any actions or suits which might be commenced or instituted by any persons being or claiming to be creditors of the said association or intended association, against all or any of the said persons parties to the said indenture of the first and second parts, or the said other subscribers or shareholders who had been or thereafter might be indemnified as aforesaid, either alone or jointly with any other person or persons, for recovering the debts due or claimed

to be due from or on account of the said association or intended association, or all or any of the members or partners thereof, or for advising on or assisting in carrying into effect any measures for obtaining contribution from the subscribers or shareholders of the said association or intended association, or for selling or disposing of the said distillery premises, plant and fixtures, and other property and effects of the said association or intended association, or otherwise relative to all or any of the debts and concerns of the same association or intended association, and the liquidation of such debts, and the winding up of such concerns; and also all the costs, charges, and expenses which the said persons parties to the said indenture of the first part, or they or the committee for the time being had paid or become liable to pay, or might thereafter pay or become liable to pay, to the persons being or claiming to be creditors of the said association or intended association, pursuant to any guarantees or securities given or thereafter to be given to induce them respectively to assist in carrying into effect some of the measures in the said indenture before mentioned or referred to; and also the costs and expenses of selling and disposing of or endeavouring to sell and dispose of the said distillery premises, plant and fixtures, and other property and effects, and making any arrangements relative thereto or to the remainder of the purchase money of the said premises, plant and fixtures, and the interest thereof, and the costs of the said Chancery suit with the said original vendor, or the persons in whose names the same premises, plant and fixtures, were contracted to be purchased; and also all other sums of money, costs, charges, and expenses whatsoever which the said persons parties to the said indenture of the first part had paid or incurred, or which they or the committee for the time being might pay or incur, or become liable or engaged to pay by reason or in consequence of any such indemnities as aforesaid already or thereafter

1838.

WILSON v. WILSON.

to be given to any subscribers or shareholders of the said association or intended association, or their representatives, or in or about or in relation to the measures already adopted, or which might thereafter be adopted, either for obtaining or compelling contribution by other subscribers or shareholders of the said association or intended association, or their representatives, or otherwise with regard to the liquidation of the debts and the winding up of the concerns of the said association or intended association—

7. Parties to contribute in equal proportions.

Seventhly, that the said several persons parties to the said indenture of the first and second parts, or their respective heirs, executors, or administrators, should and would contribute and pay *in equal shares and proportions all sums of money which might from time to time be required for the payment and satisfaction of all or any of the debts*, sums of money, bills of exchange, interest, bills of costs, salaries, costs, charges, and expenses *mentioned and referred to in and by the stipulation or clause lastly in the said indenture before contained, and which by means of the monies by the same stipulation or clause made applicable to the payment or satisfaction thereof should not be paid or satisfied;* and that, accordingly, each of them the said several persons parties to the said indenture of the first and second parts, or his heirs, executors, or administrators, should and would from time to time, within ten days after demand made thereof in writing, either by the plaintiff, his executors, or administrators, or by any of the other persons parties to the said indenture of the first and second parts, or the heirs, executors, or administrators of any of them, well and truly pay or cause to be paid to the plaintiff, his executors, or administrators, the just and equal proportion of him, the covenantor, or his heirs, executors, or administrators, of all and every sums and sum of money which should from time to time, *in addition to and in aid of the other monies then already received from the other sources in*

1838.

WILSON v. WILSON.

the said indenture before mentioned, and being in the hands of the committee for the time being, be required for the payment or satisfaction of all or any of the debts, sums of money, bills of exchange, interest, bills of costs, salaries, costs, charges, and expenses aforesaid; and that *the certificate* for the time being of the said committee, or the major part of them, *of such sums and proportions, should be conclusive evidence that the money was required or wanted, and of the proportion which each person or his representatives was or were to pay;* as by the said indenture, reference being thereunto had, will more fully and at large appear.

Certificate conclusive evidence.

The declaration then proceeded to aver, that, after the making of the said indenture, and before and at the time of the appointment of the said R. B. Forman as after mentioned, Rowland Stephenson *had become and was incapable to act as one of the committee;* and thereupon, to wit, on the 7th January, 1829, Plummer, Trower, and Dunston, who then were the other members of the committee, in pursuance and exercise of the power so given to them by the said indenture as aforesaid, did, by memorandum in writing under their hands, nominate the said R. B. Forman, being one of the said persons parties to the said indenture of the second part, to be one of the said committee in the place and stead of Stephenson; that, afterwards, and after the nomination and appointment of Forman to be one of the committee as aforesaid, to wit, on the 9th January in the year last aforesaid, Plummer, Trower, and Dunston, being the major part in number of the persons who then composed the committee, in pursuance and exercise of the power so given to them by the said indenture as aforesaid, did, by writing under their hands, nominate G. Allan and A. R. Cocker, then being two of the said persons parties to the said indenture of the second part, to be two additional members of the said committee, and did add the said G. Allan and

Averment of appointment of Forman to be a member of the committee in lieu of Stephenson;

of appointment of Allan and Cocker.

1838.

WILSON v. WILSON. Certificate.

A. R. Cocker to the number of themselves and Forman, to form with them and Forman the committee for the purposes and with the powers and authorities in the said indenture mentioned; that, afterwards, and after the nomination and appointment of Forman, Allan, and Cocker to be members of the committee as aforesaid, to wit, on the 15th September, 1836, Trower, Forman, Allan, and Cocker, being the major part of the members of the said committee, did, by writing under their hands, and in execution of the powers and authorities in the said indenture vested in the committee, certify, *as the fact was*, that the sum of 17,986*l.* *was then required or wanted for the payment or satisfaction of some of the debts*, sums of money, bills of exchange, interest, bills of costs, salaries, costs, charges, and expenses *mentioned and referred to in and by the said stipulation or clause in the said indenture in that behalf contained, and which by means of the monies* by the same stipulation or clause *made applicable to the payment or satisfaction thereof, had not been paid or satisfied;* and that the said sum of 17,986*l.* was required or wanted for the purpose aforesaid, *in addition to and in aid of the said monies then already received from the other sources in the indenture mentioned*, and then being in the hands of the committee; *and*, further, *that the sum of 529l. was the proportion which each* of the said Plummer, Stephenson, Trower, Dunston, the defendant [and the twenty-nine individuals before named], being the said several persons parties to the said indenture of the first and second parts, or his representatives, *was or were to pay* of the said sum of 17,986*l.*: of which said certificate and the premises aforesaid the defendant afterwards, to wit, on the 30th March, 1837, had notice; and the plaintiff then, to wit, on the day and year last aforesaid, by demand in writing then made by him on the defendant, required the defendant to pay, and then demanded of him payment of the said sum of 529*l.* so as aforesaid certified to be the proportion

1838.

WILSON v. WILSON.

which the defendant or his representatives was or were to pay of the said sum of 17,986*l.*: nevertheless the plaintiff said, that, although ten days after the said demand in writing so made as aforesaid had at the commencement of the suit long elapsed, the defendant had not paid the said sum of 529*l.* or any part thereof, but had hitherto wholly neglected and refused, and still neglected and refused so to do, contrary to the said covenant of the defendant by him in that behalf made as aforesaid: To the plaintiff's damage of 1000*l.* Breach.

The defendant pleaded—first, that the said supposed indenture in the declaration mentioned was not his deed—secondly, that the said Rowland Stephenson in the declaration mentioned *had not become, nor was* the said Rowland Stephenson, before or at the time of the appointment of Forman, as in the declaration mentioned, *incapable to act as one of the said committee*, in manner and form as therein alleged—thirdly, that Plummer, Trower, and Dunston, being the other members of the said committee, did not, in pursuance and in exercise of any power by the said indenture given, by memorandum in writing under their hands, nominate Forman, being one of the persons parties to the said indenture of the second part, to be one of the said committee in the place or stead of Rowland Stephenson, in manner and form as in the declaration alleged—fourthly, that Plummer, Trower, and Dunston, at the time of the supposed nomination of Allan and Cocker, as in the declaration mentioned, were not the major part in number of the persons who then composed the said committee; and that they, Plummer, Trower, and Dunston, did not, being such major part in number, after the nomination of Forman to be one of the said committee, in pursuance and exercise of any power given them by the said indenture, by writing under their hands, nominate Allan and Cocker, then being two of the persons parties to the said indenture, to be two additional members of the said committee,

Pleas—1. non est factum. 2. That Stephenson did not become incapable to act.

3. That Forman was not appointed.

4. That Allan and Cocker were not appointed.

1838.

WILSON v. WILSON.

and add the said Allan and Cocker to the number of themselves and Forman, to form with them and Forman the committee for the purposes and with the powers and authorities in the said indenture mentioned, in manner and form as in the declaration alleged — fifthly, that Trower, Forman, Allan, and Cocker, at the time of the making the said supposed certificate in writing under their hands in the declaration mentioned, were not the major part in number of the members of the said committee, in manner and form as in the declaration alleged — sixthly, that Trower, Forman, Allan, and Cocker, *did not*, being the major part of the members of the said committee, after the nomination and appointment of Forman, Allan, and Cocker to be members of the said committee, by writing under their hands, and in execution of the powers and authorities in the said indenture vested in the said committee, *certify, as the fact was, nor was it the fact*, that the sum of 17,986*l. was then required or wanted for the payment or satisfaction of some of the debts*, sums of money, bills of exchange, interest, bill of costs, salaries, costs, charges, and expenses *mentioned and referred to in and by the said stipulation or clause in the said indenture in that behalf contained, and which by means of the monies by the same stipulation made applicable to the payment or satisfaction thereof, had not been paid or satisfied*, and that the said sum was required or wanted for the purpose aforesaid, *in addition to and in aid of the other monies then already received from other sources in the said indenture mentioned*, and then being in the hands of the said committee, and *that the sum of 529l. was the proportion which each of the persons* in the said declaration in that behalf named *was or were to pay of* the said sum of 17,986*l.*, in manner and form as in the declaration alleged — seventhly, that he, the defendant, had not notice of the said supposed certificate and premises in the declaration mentioned, nor did the plaintiff, by demand in

5. That Trower &c., at the time of making the certificate, were not the major part of the committee.

6. That Trower &c. did not certify, *as the fact was, nor was it the fact*, that 17,986*l.* was required, &c.

7. No notice of the certificate, &c.

writing made by him on the defendant, require the defendant to pay, or demand of him payment of, the said 5629*l.*, in manner and form as in the declaration alleged—eighthly, that, at the time of the making and signing the said certificate in writing in the declaration mentioned by Trower, Forman, Allan, and Cocker, the said sum of 17,986*l.* *was not required or wanted for the purposes in the said certificate and declaration in that behalf mentioned*, as they the said Trower, Forman, Allan, and Cocker, before and at the time of signing the said certificate, well knew and had notice; and that they, the said Trower, Forman, Allan, and Cocker, then well knowing the premises, fraudulently and deceitfully signed the said certificate with intent to defraud the defendant and others of the persons in the said certificate named.

8. That the sum mentioned in the certificate was not required &c., and that the certificate was fraudulent.

The first seven of the above pleas concluded to the country; and on these the plaintiff joined issue.

Similiter.

To the eighth plea (which concluded with a verification) the plaintiff replied—that, at the time of the making and signing of the said certificate in writing in the declaration and in the last plea respectively mentioned, the said sum of 17,986*l.* *was required and wanted for the purposes in the said certificate and in the declaration in that behalf mentioned*; and that the said Trower, Forman, Allan, and Cocker did not fraudulently and deceitfully sign the said certificate, with intent to defraud the defendant and others of the persons in the said certificate named, or any of them, in manner and form as the defendant had in his said last plea alleged—concluding to the country: issue thereon.

Replication to the eighth plea—that the 17,986*l.* *was* required &c., traversing the alleged fraud.

At the trial before Tindal, C. J., and a special jury, at the adjourned sittings in London after Michaelmas Term, 1836, the facts that appeared in evidence were as follow:—

In the early part of the year 1825, an attempt was made to establish a joint-stock company for the distillation of

History of the company.

1838.

WILSON v. WILSON.

British spirits, to be called "The Imperial Distillery Company." Directors &c. were appointed, and advertisements and prospectuses were issued for the purpose of making known the existence and the objects of the proposed association (32). The company, in the names of three of the directors, purchased for 30,000*l.*, of Mr. J. G. Booth, distillery premises, plant, and fixtures, at Stanstead Abbots, in Hertfordshire. Possession was taken of these premises, and liabilities incurred by the directors to the amount of 13,000*l.*, in alterations, iron tanks, millwrights' work, backs, &c. Mr. Booth received one half of the purchase money; the residue, together with the debts contracted by the company, remained unpaid. A deed of settlement for regulating the conduct of the affairs of the company was prepared: this deed was executed by several but not by all of the shareholders. Towards the close of 1826, the creditors became clamorous, and threatened to resort to individual shareholders; and one of them, Mr. Bird, an iron-master at Swansea, whose demand exceeded 4,000*l.*, in Michaelmas Term, 1826, commenced an action in the court of King's Bench against Aston (one of the original directors of the company), Plummer, and Knibbs.

Bird v. *Aston.*

This cause was tried before Lord Tenterden, at the sittings at Westminster after Hilary Term, 1827 (33), when a verdict was found against Plummer and Knibbs, his lordship ruling that those of the shareholders who had executed the deed of settlement were liable as partners for the debts of the concern.

A number of shareholders, taking alarm at the result of the case of *Bird* v. *Aston*, met for the purpose of devis-

(32) See the general scope of the speculation, and the advertisements and prospectuses, fully set out in Fox v. Clifton, 4 Moore & Payne, 677; and see 2 M. & Scott, 146.

(33) Bird v. Aston, not reported: cited in Fox v. Clifton, 4 M. & P. 699. Aston had been bankrupt, and had obtained his certificate.

1838.

WILSON v. WILSON.

ing means to liquidate the debts of the company by an equitable adjustment amongst themselves: and in the result the deed declared on, dated the 28th July, 1827, was prepared and executed. Upon executing the deed, each subscriber paid a sum of 25*l.*, and the amount of calls due on his shares.

At this time it was doubtful whether or not such of the shareholders in this and other companies of the like description who had not signed the deed of settlement, nor taken any prominent part in the management, were liable to be sued for the debts of the company. The committee therefore compromised with those who had not signed the deed of settlement (34), upon easier terms.

The sums obtained from these last mentioned persons, with those received under the deed of the 28th July, 1827, were found inadequate to satisfy the demands of the creditors. Mr. Booth had brought an action against some of the shareholders, to recover the balance of the purchase money for the distillery premises at Stanstead, and interest thereon. The committee being advised that this action could not successfully be resisted, and finding that the premises at Stanstead would not produce above 6,000*l.*, agreed to compromise with Mr. Booth, by allowing him to resume possession, and paying him a further sum of 5,000*l.*, and 350*l.* for his costs. Several actions were brought by creditors of the company, at the request of the committee, acting under the deed of the 28th July, 1827, and upon their guarantee, against shareholders who had refused to contribute to the fund. Of these, three only were tried, viz. *Lane* v. *Perring*, *Pontifex* v. *Dunston*, and *Fox* v. *Clifton*. In all these actions the plaintiffs were ultimately unsuccessful, the respective defendants (some of whom had not signed the deed,) not being partners, nor having held themselves out as partners in the concern: and the committee were obliged to pay large sums for costs.

(34) The defendants in these actions had all executed this deed.

1838.

WILSON v. WILSON.

Stephenson becoming incapable to act as a member of the committee,

Forman nominated in his stead.

In December, 1828, Rowland Stephenson, one of the committee named in the deed of July, 1827, absconded from his creditors, and went to America, where he has ever since resided. A commission of bankrupt issued against the firm of which he was a member: but he never appeared to that commission. Under these circumstances, the remaining members of the committee, Plummer, Trower, and Dunston, conceiving, that, by so absconding, Stephenson had become "incapable to act," by a memorandum in writing signed by them, and bearing date the 7th January, 1829, reciting so much of the deed of July, 1827, as impowered them to nominate a new member in the place of one who should "die, or desire to be discharged from acting, or decline or become incapable to act," (the *third* covenant), and reciting that Stephenson had become incapable to act, in pursuance and exercise of the power so given to them by the said indenture, nominated R. B. Forman to be one of the committee in the place and stead of Stephenson.

Allan and Cocker added to the committee.

And on the 9th January, 1829, Plummer, Trower, and Dunston, by a further memorandum signed by them, reciting the discretionary power vested in them by the deed of the 28th July, 1827, to add to the number of the committee (the *second* covenant), and reciting the appointment of Forman in the place of Stephenson, nominated G. Allan and A. R. Cocker to be two additional members of the committee.

[* Finding that the funds which had been realized under the deed of the 28th July, 1827, were insufficient to meet the demands upon them, the committee in January, 1829, determined to require a contribution from the parties to that deed, pursuant to the covenant in that behalf (the *seventh* covenant). Accordingly, on the 13th of that month,

* The part inclosed in brackets is applicable only to the cases of Wilson v. Wilson and Wilson v. Steel. The documents adverted to were put in by the defendants.

1838.

WILSON v. WILSON.

Plummer, Trower, Dunston, Forman, Allan, and Cocker, signed the following certificate:—

"We, the undersigned, being members of the committee acting under the powers and authorities mentioned in a certain indenture [date and parties], do hereby certify that the sum of 5,100*l.* *is at present required or wanted for the payment or satisfaction of some of the debts*, sums of money, bills of exchange, interest, bills of costs, salaries, costs, charges, and expenses *mentioned and referred to in and by the stipulation or clause contained in the said indenture, and which by means of the monies by the same stipulation or clause made applicable to the payment or satisfaction thereof have not been paid or satisfied; and that the said sum of* 5,100*l.* *is required or wanted for the purpose aforesaid, in addition to or in aid of other monies already received from the other sources in the said indenture mentioned*, and being in the hands of the said committee: and we further certify *that the sum of* 150*l.* *is the proportion which each of the persons thereinafter mentioned* (the thirty-four persons, including the defendant, parties to the indenture of the first and second parts), or his representatives, *is or are to pay of the said sum of* 5,100*l.*"

Jan. 13, 1829. Certificate of 5,100*l.* being required.

150*l.* the proportion of each of the parties to the deed.

A copy of this certificate, signed by all the committee, was delivered to each of the thirty-four persons named in it, accompanied by a demand dated January 14th, and signed by the plaintiff, in the following form:—

"Sir,—I do hereby demand the payment by you or your heirs, &c., to me, or to Messrs. Swain & Co. for me, pursuant to your covenant in an indenture [date and parties], of the sum of 150*l.*, being the sum which the committee acting under the provisions of the said indenture, have by their certificate, dated the 13th day of this instant January, certified to be the proportion which you or your representatives are to pay of the sum of 5,100*l.* which the said committee have thereby certified to be at present required or

Jan. 14, 1829. Demand of the 150*l.*

1838.

WILSON v. WILSON.

wanted for the payment or satisfaction of some of the debts, sums of money, bills of exchange, interest, bills of costs, salaries, costs, charges, and expenses mentioned and referred to in and by the stipulation or clause contained in the said indenture, and which by means of the monies by the same stipulation or clause made applicable to the payment or satisfaction thereof have not been paid or satisfied; and which sum of 5,100*l.* the said committee have also thereby certified to be required or wanted for the purpose aforesaid, in addition to and in aid of the other monies already received from the other sources in the said indenture mentioned, and being in the hands of the said committee."

Wilson and Steel only paid the 150*l.*

Of the thirty-four persons parties to the deed of the 28th July, twenty-three only (including the defendants Wilson and Steel) contributed the 150*l.* each.

Voluntary contributions received by the committee.

The default of the parties who failed to contribute their 150*l.* each, and] the increasing urgency of the creditors of the company for payment of their demands, and other circumstances, rendered it necessary for the committee themselves to make advances, and to require advances in the name of contributions (without the formality of certificates) from other willing persons parties to the deed of July, 1827. This mode of raising the necessary funds was repeated on several occasions: and the result was, that, of the thirty-four persons who ought, pursuant to the deed of arrangement, to have contributed in equal proportions—ten had contributed nothing—ten had contributed 850*l.* each—one, 796*l.* 19*s.* 8*d.*—three, 600*l.* each—one, 450*l.*—four, 400*l.* each—one, 300*l.*—and four, including the defendants Wilson and Steel, 150*l.* each.

Application of monies.

All the monies thus advanced or contributed were duly applied towards payment of the debts, sums of money, bills of exchange, interest, bills of costs, salaries, &c., mentioned in the deed of the 28th July, 1827.

Sums due at

At the time of making the certificate set forth in the

declaration, and hereafter mentioned, there remained due of the debts &c. mentioned in the deed of July, 1827, the sum of 3,989*l.* 0*s.* 4*d.*, besides the several sums voluntarily advanced as before alluded to, amounting to 14,046*l.* 19*s.* 8*d.*

The committee, under the impression that this last mentioned sum might be considered as representing an equal amount of debts, &c., and that such equal amount would, for the equitable purpose of enforcing a just contribution by all the parties, be considered as remaining due, and to be provided for under the covenants and stipulations of the deed of July, 1827, and might be added accordingly to the 3,989*l.* 0*s.* 4*d.*, on the 15th September, 1836, made a second certificate, similar in form to the certificate of the 13th January, 1829, whereby they certified "that the sum of 17,986*l.* is at present required or wanted for the payment or satisfaction of some of the debts, &c., mentioned and referred to in and by the stipulation or clause in that behalf contained in the said indenture, and which by means of the monies by the same stipulation or clause made applicable to the payment or satisfaction thereof have not been paid or satisfied; and that the said sum of 17,986*l.* *is required* or wanted for the purpose aforesaid *in addition to and in aid of the other monies already received* from the other sources in the said indenture mentioned, and being in the hands of the said committee:" and they further certified "that the said sum of 529*l.* is the proportion which each of the persons hereinafter mentioned (naming them, as before), or their representatives, is or are to pay of the said sum of 17,986*l.*

This certificate, and the demand accompanying it (which was dated the 3rd November, 1836, and was in the same form as the demand made upon the former occasion), were signed by four only of the committee—described as "the major part of the members of the committee"—Plummer and Dunston having both become bankrupt since the mak-

the time of making the certificate declared on.

Sept. 15, 1836. Certificate of 17,986*l.* being required.

By whom signed.

1838.

WILSON v. WILSON.

ing of the former certificate, and having ceased to interfere in the business (35).

The last-mentioned certificate and demand were accompanied by a letter from Messrs. Swain & Co., the plaintiff's attornies, as follows—the postscript being contained only in those that were addressed to parties who had made the advances before alluded to:—

Letter accompanying the demand.

"Sir,—By direction of the committee acting under the powers and authorities contained or mentioned in the indenture of the 28th July, 1827, a formal demand of payment of 529*l.* will be delivered to you with this; and we request that you will pay that sum into our hands within ten days after the receipt of the demand, according to your covenant in the said indenture, and the stipulations of that deed. We are &c.,

Swain, Stevens, & Co.

Postscript.

"We are directed to add, that, upon your payment of the 529*l.*, you will have due allowance for the money which you some time ago advanced."

The present actions were brought to recover from the several defendants this sum of 529*l.*, minus (in the cases of Wilson and Steel) the 150*l.* paid by them on the former certificate.

Objections—as to proof of Stephenson's incapacity to act:

that the certificate was false.

On the part of the defendant it was objected that there was no evidence of the incapacity of Stephenson to act as a member of the committee, and therefore that the appointment of Forman in his stead was void. It was further objected that the certificate of the 15th September, 1836, was not true, inasmuch as it stated that 17,986*l.* *were then required for the payment of the debts* &c. mentioned in the indenture, and which by means of the monies by the deed made applicable to the payment thereof had not been

(35) It is to be observed that of the four individuals who signed this certificate, viz. Trower, Forman, Allan, and Cocker, one only (Trower) was a member of the committee as originally constituted.

paid, and that 529*l.* was the proportion which each of the persons named in the certificate was to pay of that sum; whereas, in truth, the greater part of it was wanted *for the purpose of reimbursing the parties who had from time to time made advances to the committee for the purpose of paying the debts;* and some of the parties from whom the certificate stated 529*l.* to be due, having already considerably overpaid that amount (36).

In *Wilson* v. *Wilson* and *Wilson* v. *Steel*, there was this further objection to the certificate, viz. that no notice was taken of the payment of the 150*l.* by each of those defendants under the former certificate.

Summing up.

Stephenson's incapacity.

With respect to the first objection, his lordship said he could have no doubt that a man who went away to America in the manner in which the evidence shewed Stephenson to have gone, with an intention of not returning, evidenced as that intention was by his afterwards failing to surrender himself to the commission issued against him, was shewn to be incapable of executing such trusts as those contained in the deed of the 28th July, 1827: and, as to the certificate—that it seemed to him not to make any real difference whether the money was demanded in order to pay it to creditors who had not been satisfied, or for the purpose of reimbursing those who had advanced money to the committee to meet the creditors' demands—assimilating it to the case of an executor who pays a demand against the estate of his testator before assets have come to his hands, and afterwards, when they do come to his hands, retains them to reimburse himself; and he told the jury that the question for them, upon this part of the case, was, whether the sum of 17,986*l.* *was really due*

Sufficiency of the certificate.

(36) The validity of the appointment of Allan and Cocker as additional members of the committee, was also questioned. And it was further objected that the deed of the 28th July, 1827, was void for maintenance. These and other matters arising upon the record were reserved, to form the subject of a special verdict.

1838.

WILSON v. WILSON.

under the exigency of the deed and for the purpose of making good payments which had been made according to the stipulations contained in the deed: and ultimately it was left to the jury to say—first, whether or not, at the time of the appointment of Foombe as a member of the committee, Stephenson had become incapable of acting—secondly, whether or not the certificate of September, 1836, was false within the knowledge of the committee.

Finding of the jury.

The jury found that Stephenson was incapable of acting, and that the certificate was correct in substance.

A verdict was thereupon entered for the plaintiff, in each of the six actions, upon the first, second, sixth, seventh, and eighth issues: the questions arising on the third, fourth, and fifth issues to be stated in a special verdict.

Motion.

In Hilary Term last, *Bompas*, Serjeant, for the defendants Wilson, Sir J. S. Lillie, and Perring, *Erle* for Steel and Butler, and *Crowder* for Howell, respectively obtained rules calling on the plaintiff to shew cause why the verdict found for him should not be set aside, and a new trial had. The grounds of motion in each case were similar to those urged at the trial—that the certificate was false to the knowledge of the committee, and the Lord Chief Justice's construction of the deed in this respect erroneous.

Wilde, Serjeant, and *Whateley* shewed cause.—The verdict upon the sixth and eighth pleas was properly found for the plaintiff. Regard being had to the whole scope and intention of the deed of the 28th July, 1827, the certificate is in strict conformity with it, and is true in fact. The committee could not in a more correct or convenient form ascertain the proportion payable by each party under the deed. The certificate, after stating the gross sum required for the purpose of carrying into

As to the sixth plea.

1838.

WILSON v. WILSON.

effect the objects contemplated by the deed, finds 529*l.* to be the proportion of loss which each party to the deed is to bear: but, when the demand is made, the parties who have already made advances are told that the sums they have advanced will be set off against the amount declared by the certificate to be payable by each. It is difficult to perceive how a more equitable and proper adjustment could have been made. Besides, the defendants, unless they shew fraud, are estopped from contesting the truth of the certificate, by the stipulation they have entered into in the seventh covenant in the deed, which provides "that the certificate for the time being of the said committee, or the major part of them, of such sums and proportions, shall be *conclusive evidence* that the money is required or wanted, and of the proportion which each person or his representatives is or are to pay." In *Whitehead* v. *Tattersall*, 1 Ad. & E. 491, where covenantor and covenantee submitted the amount of damages accruing from a breach of covenant, to an arbitrator; it was held that, in an action on the covenant, the arbitrator's award was conclusive as to the amount of damages, unless the award itself could be impeached. Taunton, J., referred to *Doe* d. *Morris* v. *Rosser*, 8 East, 15, where the lessor of the plaintiff and the defendant in ejectment had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor of the plaintiff, it was held that the award concluded the defendant from disputing the lessor's title in an action of ejectment.

As to the eighth plea.

With respect to the eighth plea, the evidence and the finding of the jury equally negative fraud in fact and fraud in law. The certificate was made bonâ fide, and was in all respects true.

As to the sixth issue.

Bompas, Serjeant, and *Cleasby* (for the defendant Wilson), in support of the rule.—The declaration avers that the major part of the members of the committee certified,

1838.

WILSON v. WILSON.

as the fact was, that the sum of 17,986*l.* was required for the payment of some of the debts &c. made payable by the deed, and that 529*l.* was the proportion which each of the parties named was to pay. The sixth plea distinctly denies the truth of that allegation. The evidence shewed beyond a doubt that the certificate was false; a portion of this sum of 17,986*l.* having already been raised, partly under a former certificate, and partly by voluntary advances made by certain parties to the deed; and the sum actually remaining due to the company's creditors in fact being only 3,939*l.* 0*s.* 4*d.* And there is no pretence for saying that the parties are estopped from denying the truth of the certificate, by the stipulation in the deed that the certificate should be conclusive evidence that the money was required, and of the proportion which each party was to pay; for the truth or falsehood of the certificate is put in issue by the plaintiff himself.

As to the eighth issue.

Then, the certificate being false in fact, and false to the knowledge of the parties signing it, it is fraudulent in point of law, and therefore incapable of being enforced. In *Pasley* v. *Freeman*, 3 T. R. 58, Buller, J., says: "That knowledge of the falsehood of the thing asserted constitutes fraud, though there be no collusion, is proved by the case of *Rainey* v. *Selby*, Salk. 211, where, upon a treaty for the purchase of a house, the defendant fraudulently affirmed that the rent was 30*l.* per annum, when it was only 20*l.* per annum, and the plaintiff had his judgment; for, the value of the rent is a matter which lies in the private knowledge of the landlord and tenant, and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it. No collusion was there stated, nor does it appear that the tenant was ever asked a question about the rent, and yet the purchaser might have applied to him for information; but the judgment proceeded wholly upon the ground that the defendant knew that what he asserted was false." In *Haycraft*

1838.

WILSON v. WILSON.

v. *Creasy*, 2 East, 92, Lord Kenyon says: "The defendant affirmed that to be true within his own knowledge which he did not know to be true. This is fraudulent; not perhaps in that sense which affixes the stain of moral turpitude on the mind of the party; but falling within the notion of legal fraud, such as is presumed in all cases within the statute of frauds. The fraud consists not in the defendant's saying that he believed the matter to be true, or that he had reason so to believe it, but in asserting positively his knowledge of that which he did not know." And his lordship afterwards added, "that, as to the want of criminal intention in the party making the false representation, he had learned from Lord Bacon's Maxims that there was a distinction in that respect between answering civiliter and criminaliter for acts injurious to others: in the latter case the maxim applied, actus non facit reum, nisi mens sit rea; but it was otherwise in civil actions, where the intent was immaterial, if the act done were injurious to another." In *Foster* v. *Charles*, 4 M. & P. 61, 741, 6 Bing. 396, 7 Bing. 105, which was an action on the case for false representations made by the defendant to the plaintiffs touching the character and circumstances of an agent or traveller he was desirous of recommending to them, and for the fraudulent concealment of facts within his knowledge and which he ought to have communicated to the plaintiffs, the judge told the jury, that, if the defendant made the representations knowing them to be false, and injury resulted therefrom to the plaintiffs, he was guilty of fraud in the legal acceptation of the term, and answerable in damages, although he made the representation without any design to benefit himself thereby: the jury having returned a verdict for the plaintiffs, accompanying it with this statement—"We consider that there was no fraudulent intention on the part of the defendant, though that which he has done legally constitutes a fraud"—this court held that the action lay. So, in *Cor-*

1838.

WILSON v. WILSON.

bett v. *Brown*, 1 M. & Scott, 85, 8 Bing. 33, where the defendant's son having purchased goods from the plaintiffs on credit, they wrote to the defendant, requesting to know whether his son had, as he stated, 300*l.* capital, his own property, to commence business with, to which the defendant replied, that his son's statement as to the 300*l.* was perfectly correct, as the defendant had advanced him the money: and it was proved, that, at the time of the advance, the defendant had taken a promissory note from his son for 300*l.*, payable on demand, with interest, which interest was paid; and six months after the communication to the plaintiffs, the defendant's son became bankrupt: it was held that it was properly left to the jury to say whether the representation made by the defendant was false within his own knowledge; and, the jury having found a vordict for the defendant, the court granted a new trial. Alderson, J., there says (8 Bing, 37): "The question is, whether, from the statement's being false within the defendant's knowledge, the court must not infer fraud." *Polhill* v. *Walter*, 3 B. & Ad. 114, is an authority to the same effect. There, a bill was presented for acceptance at the office of the drawee, when he was absent. A., who lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, was induced to write on the bill an acceptance as by the procuration of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the latter. The bill was dishonored when due, and the indorsee brought an action against the drawee, and, on proof of the above facts, was nonsuited. The indorsee then sued A. for falsely, fraudulently, and deceitfully representing that he was authorized to accept by procuration; and on the trial the jury negatived all fraud in fact. And it was held that A. was notwithstanding liable, because the making of a representation which a party knows to be untrue, and which is *intended*, or is calculated, from the mode in which

1838.

WILSON v. WILSON.

it is made, to induce another to act on the faith of it, so that he may incur damage, *is a fraud in law*, and A. must be considered as having intended to make such representation to all who received the bill in the course of its circulation. So, here, the finding of the jury must be taken to negative only moral fraud, and not the legal fraud resulting from an untrue statement of facts calculated and intended to inflict an injury on the defendant.

Cur. adv. vult (37).

TINDAL, C. J., now delivered the judgment of the court:—

Wilson v. Wilson.

The point before us in this case relates to the mode in which the finding of the jury ought to be entered in a special verdict upon the issues raised on the sixth and eighth pleas. The declaration contains an averment "that the major part of the members of the committee did, by writing under their hands, and in execution of the powers and authorities in the said indenture vested in them, certify, *as the fact was*, that the sum of 17,986*l.* was then required or wanted for the payment of some of the debts," &c.; and, further, "that the sum of 529*l.* was the proportion which each of the parties named in the declaration (of whom the defendant was one) was to pay:" and the sixth plea traverses in terms that they had so certified, "as the fact was, nor was it the fact;" upon which traverse the issue is joined. Upon the evidence it appeared, that, in point of fact, a part of this 17,986*l.* had been already raised and paid, under a former certificate, to the committee, for the purposes mentioned in the indenture; and that the defend-

Averment in the declaration as to the making of the certificate.

Sixth plea.

Evidence.

(37) The case *tried* was that of Wilson v. Butler. That argued was Wilson v. Wilson, in order that the one argument should embrace the whole of the objections; it being agreed by the counsel on both sides that the five other causes should abide the event of the argument on this.

1838.

WILSON v. WILSON.

ant himself was one of the persons who, amongst others, had actually paid under such former certificate the sum of 150*l.* towards and in part of his share of the sum mentioned in the present certificate.

Argument for plaintiff.

The plaintiff contends, that, notwithstanding such proof, the finding upon the sixth plea ought to be in his favour, for two reasons—first, that, looking at the whole frame of the deed, the certificate is, as he contends, substantially true; for, although some of the parties named in the declaration had paid a part, by far the majority of them had *not* paid any part of their quota of the 17,986*l.*; and that it was open to the committee to consider the whole sum as still unpaid for the single purpose and object of making all contribute equally; the committee effecting, as they contended, such purpose and object by intimating to the defendant and the others who had paid part of the demand, that credit would be given to them for the sums which they had respectively paid, when they satisfied the residue.

Certificate inconsistent with the facts.

But we consider that the certificate which has been given is inconsistent with the facts proved upon the trial; and we think it forms no excuse for certifying a larger sum to be due from the defendant than is actually due, that it would create a difficulty or intricacy in the certificate if it should embody in it the statement of the account of each of the covenantors as it really stood; nor is it an excuse, that no real injury will be eventually occasioned thereby to the defendant or the other covenantors; for, the certificate is either true or false at the moment it is made; and, if untrue at the time when it is made, the notice given to the defendant when the larger amount was demanded from him, that, instead thereof, the smaller sum would be accepted, cannot set up the truth or validity of the certificate; the more especially as such notice was not given until some months after the certificate was signed.

As to the alleged estoppel.

The plaintiff, however, further contends that the defend-

ant is estopped from contesting the truth of the certificate, by the stipulation into which he entered in the deed, that the certificate of the major part of the committee, of the sums and proportions required, "shall be conclusive evidence that the money is required or wanted, and of the proportion which each person is to pay." To which objection it appears to us a sufficient answer that the plaintiff has not relied upon the estoppel, but has himself opened the truth or falsehood of the facts stated in the certificate, by averring them to be true, and thereby making the truth of such facts the very issue which the jury are called on to try; and that, on an issue so framed, the jury are bound to find according to the real truth of the facts proved before them.

We therefore think the issue raised upon the sixth plea must be found for the defendant.

The issue raised upon the eighth plea is raised upon the point whether the committee, "well knowing the premises, fraudulently, and deceitfully signed the certificate with intent to defraud the defendant and others." And it is contended by the defendant, that, to certify that which is not true, and not true to the knowledge of the party certifying, amounts to fraud in law; and that the verdict on this issue also should be found for the defendant. But, admitting this definition of fraud in law to be correct when applied to the subject-matter of the several cases from which it has been drawn—as, in the false representation of character, and the like—we think it inapplicable to the issue as framed upon this record: for, we cannot understand the issue in any other light than as raising the question of *fraud in fact*, nor can we conceive terms more appropriate than the present to express the charge of fraud and covin in fact. The plea ascribes the conduct of the persons signing the certificate to some unworthy motives; such as, the intention to raise from the contributors, for private purposes of their own, more

Eighth plea.

1838.

WILSON v. WILSON.

than was really due, or the like: whereas, upon the evidence, it is perfectly clear, from the notice given at the same time with the demand, that the only object and intention of the committee was, to raise by one single certificate, which applied to all the covenantors equally, the proportion that was really due from each individual contributor, after giving him credit for the sums he had paid. It was no more than the adopting of a piece of machinery which was not properly calculated for the object, with perfect bona fides on the part of the committee.

We think, therefore, the finding on the eighth plea should be entered for the plaintiff.

As to the actions the defendants in which had not paid the 150*l.*

And we think the fact found in four other actions brought on this deed, viz. that in those actions the defendants had *not* paid the 150*l.* under the former certificate and demand, will make no difference as to the finding upon the issue raised on the sixth plea in those actions; for, the certificate as to the gross sum certified to be due, is as much disproved by the evidence in those cases as in the present.

Verdict for the defendant on the sixth plea, and for the plaintiff on the eighth plea.

Wednesday, May 30th.

NEWHAM *v.* TAITE.

In an action on a contract for building a chapel, the court refused to grant the plaintiff a rule for a view.

THIS was an action upon a contract for building a chapel.

Wilde, Serjeant, on the part of the plaintiff (the builder), moved for a view of the premises, with his witnesses. [*Vaughan*, J.—This is a novel application.] It is not the less reasonable: and there can be no doubt as to the *power* of the court to grant it. [*Vaughan*, J.—It is very

1838.

NEWHAM v. TAITE.

like asking the court to authorize you to commit a trespass.]

TINDAL, C. J.—I have a difficulty in seeing how the rule could be enforced if we granted it. If you have any authority, the case may be mentioned again.

Rule refused (38).

(38) It was not mentioned again.

MASON *v.* WHITEHOUSE.

Saturday, June 9th.

A demand by the attorney of costs that are costs in the cause, will support an attachment for nonpayment of them, though they are by the rule directed to be paid *to the party*, and there is no power of attorney.

ON the 3rd May, in Easter Term last, this court made absolute a rule for setting aside an attachment that had issued against the plaintiff for nonpayment of costs of the day for not proceeding to trial, on the ground that the costs were by the rule of court directed to be paid *to the defendant*, and the demand had been made by *his attorney:* vide ante, 246.

Whateley, on a former day in this term, moved that the rule of the 3rd May might be reconsidered. He observed, that, upon inquiry, it had been ascertained to be the uniform practice of the other courts to grant attachments under similar circumstances; it being held, that, where the costs made payable by the rule are *costs in the cause* (as these were), a demand by the attorney on the record is sufficient, though he be not named in the rule. And he cited *Cox* v. *Salmon*, 2 M. & Welsby, 127, and *Inman* v. *Hill*, 6 Dowl. 666, where Lord Abinger and Parke, B., expressly so held.

The Court took time to confer with the other judges: and now—

1838.

MASON v. WHITEHOUSE.

TINDAL, C. J., said, that having looked into the authorities, and re-considered the matter, they were of opinion that the present case should follow the decisions in *Cox* v. *Salmon* and *Inman* v. *Hill*, and that there was no necessity in a case like this for a power of attorney to enable the attorney on the record to make the demand.

Rule accordingly (39).

(39) A demand of costs which by the rule are payable to a high-sheriff, made under the authority of a power of attorney executed by the under-sheriff after the high-sheriff has gone out of office, is sufficient to support an attachment. Regina v. Mattey, 6 Dowl. 515.

Monday, June 11th.

Where a party comes to the court to cure a trifling irregularity, such as ought to be disposed of at chambers, he will not be allowed costs, but they will be made costs in the cause.

ROBARTS *v.* LEMON.

WORDSWORTH obtained a rule nisi to set aside the service of a writ of summons for irregularity—the name of the county in which the defendant resided being omitted.

Wilde, Serjeant, shewed cause.—He submitted that the application ought to have been made to a judge at chambers, and not in court: and he produced an affidavit in which it was sworn, that, before the rule was obtained, notice had been given to the defendant that the service was waived, and a sum of 30*s.* tendered for any costs he might have incurred in consequence of the irregularity. [*Tindal*, C. J.—That is a sufficient answer. Besides, the defendant ought not to have set this expensive machinery in motion: he should have applied to a judge at chambers.]

Wordsworth contended that it was the constant course in the other courts, and even here, to make such applica-

1838.

ROBARTS v. LEMON.

tions. He cited *Ex parte Davies*, 5 Scott, 241, where this court amended a writ of habeas corpus which had been erroneously tested as of Trinity Term, 1 Victoriæ, instead of 7 Will. 4.

TINDAL, C. J.—The rule may be made absolute, but the costs shall be costs in the cause.

The rest of the court (Park, J., excepted,) concurring—

Rule absolute accordingly.

STAFFORD *v.* NICHOLLS.

Monday, June 11th.

At a quarter past eleven on the morning after the time for pleading had expired, the defendant's attorney called at the office of the plaintiff's attorney, in Buckingham Street, Strand, for the purpose of delivering a plea. Being informed that a clerk had just gone to the Temple to sign judgment, the defendant's attorney hastened thither, and arrived at the office just as the judgment had been signed:—Held, that the judgment was regular.

THE time for pleading (under a judge's order) in this case expired on the 18th May. On the morning of the 19th, at a little after 11 o'clock, the defendant's attorney's clerk called at the office of the plaintiff's attorney, in Buckingham Street, in the Strand, for the purpose of delivering a plea. The plaintiff's attorney refused to receive the plea, alleging that his clerk *had just gone* to the office in the Temple to sign judgment. The clerk to the defendant's attorney thereupon hastened to the office, and arrived there, according to his own statement, whilst the plaintiff's attorney's clerk was *in the act of signing judgment*; but, according to the affidavits on the other side, the judgment *had just been signed*. The plea was there again tendered, and refused.

Wilde, Serjeant, upon an affidavit of the facts, and of merits, on a former day, obtained a rule nisi to set aside the judgment. The rule did not ask for costs.

Talfourd, Serjeant, shewed cause, upon affidavits shewing the circumstances under which the judgment was signed, and a long detail of facts to shew the improbability

1838.

STAFFORD v. NICHOLLS.

of the defendant having any real defence. He submitted that the judgment was regularly signed; for that it was impossible the clerk who was in the act of signing judgment at the office in the Temple could know what was passing in Buckingham Street at the moment he was so employed.

Wilde, Serjeant, in support of his rule.—It is almost of course to set aside even a regular judgment where there is an affidavit of merits. [*Tindal*, C. J.—Will the defendant bring the money into court?] A defendant is never required to bring money into court as a condition for setting aside an irregular judgment: and here the judgment is clearly irregular (though the rule was not moved with costs), the fact of the judgment having been signed after the pleas had been tendered in Buckingham Street being ascertained beyond dispute. [*Vaughan*, J.—The judgment was well signed. The clerk who signed it could not possibly know that a plea had been delivered between the time of his leaving his employer's office and of his arrival at the Masters' office]. What pretence is there for saying that the mere sending a clerk to sign judgment is an actual signing of judgment? [*Vaughan*, J.—You contend that the signing judgment became irregular by the event. Have you any authority?] None could be necessary to support so self-evident a proposition. The simple question is whether or not the delivery of the plea preceded the actual signing of judgment. That it did, is placed beyond doubt. A judgment so signed clearly could not stand in a court of error. It will be extremely inconvenient if the regularity of a judgment is to depend upon whether or not a messenger has been dispatched from the attorney's office for the purpose of signing it, or whether he has proceeded with a greater or less degree of speed. Under the circumstances, the judgment should be set aside as irregular, *without costs*; or,

1838.

STAFFORD v. NICHOLLS.

at all events, it must be set aside upon the usual terms, and without the imposition of any extraordinary condition.

TINDAL, C. J.—It is clear that the defendant is the party who was originally in fault, in not having pleaded in time. If the judgment be signed after plea delivered, it is of course irregular, and must be set aside: but there is no authority for saying that there must not be some knowledge of the fact in the mind of the party at the time of signing judgment. If the act be done bonâ fide, as it appears to have been done in this case, I think there is no ground for holding that any irregularity exists. The judgment therefore being regular, it can only be set aside on the usual terms.

PARK, J.—I am of the same opinion.—There can be no doubt but that the judgment was bonâ fide signed in this case; for, when the defendant's attorney's clerk reached the office, he found that it had been actually signed, though he no doubt made the best of his way there from Buckingham Street. Suppose the plaintiff's attorney had resided at the distance of five or six miles from the office, and a clerk had been sent to sign judgment, and the plea had been delivered an hour or an hour and a half after the clerk had left the office; could a judgment signed under such circumstance be held irregular?

VAUGHAN, J.—The question is whether the judgment here was signed in time. The plaintiff was entitled to sign it at the opening of the office—11 o'clock. His attorney had actually sent a clerk for that purpose; and the plea was not tendered until a quarter past eleven. *Leigh* v. *Bender*, 4 Dowl. 201, comes very near this case: there, the time for pleading expired on the evening of Monday, and the plea was delivered about ten minutes before eleven

1838.

STAFFORD v. NICHOLLS.

on Tuesday moning; the plaintiff's attorney refused to receive the plea, his clerk having already departed for the purpose of signing judgment: but the court held, that, inasmuch as the plea was delivered before the time when the plaintiff could properly sign judgment, it was in time, and the judgment irregular. Here, however, the plaintiff was clearly entitled to sign judgment at the time his attorney's clerk was put in motion for the purpose of signing it, and the judgment was actually signed before he had notice that the plea had been delivered or tendered. It would be manifest injustice under the circumstances to mulct the plaintiff in the costs of setting aside a judgment so signed. Justice will be answered by letting the party in to defend upon the terms mentioned.

COLTMAN, J.—This difficulty could never have arisen under the old practice, when the pleas were filed: the plea and judgment being both in the office, the plea had the preference. It would be unjust in this case to deprive the plaintiff of the costs of the judgment, if he was acting bonâ fide. I am fully sensible of the inconvenience of this decision: but the contrary course would, as it seems to me, be productive of still greater mischief and uncertainty. The costs here will fall upon the party that is in default.

Rule absolute, on payment of costs, &c.

Wednesday, June 13th.

ENGLER, Administrator, *v.* TWYSDEN, Bart.

A rule for entering and docketting the judgment must be addressed to the party, and not to the attorney.

FITZJAMES, on a former day, on the part of the defendant, obtained a rule calling on the plaintiff's attorney to shew cause why the judgment should not be entered on the roll and docketted.

1838.

ENGLER v. TWYSDEN.

Where a party sues or is sued in a representative character, affidavits made in the cause should be intituled accordingly.

W. H. Watson, who appeared to oppose the rule, took a preliminary objection that the affidavit upon which it was obtained was not properly intituled; it not appearing of whom the plaintiff was administrator. He cited *Steyner* v. *Cottrell*, 3 Taunt. 377, where the plaintiff sued as assignee of a bail-bond, and, in the title of an affidavit upon which a rule for setting aside the proceedings was obtained, the plaintiff was styled "assignee," without further explanation; and the court held the defect fatal.

Fitzjames, contrà.—This motion being a mere continuation of the proceedings in the cause, the same particularity in the style of the parties cannot be necessary as in the case cited, where the object was to set aside the proceedings.

PER CURIAM.—Upon the authority of the case referred to, we think this affidavit is defective.

Watson waived the objection, and prayed that the rule might be discharged with costs, on the grounds that it was improperly addressed to the attorney instead of to the plaintiff in the action, and that the application should have been made to a judge at chambers.

Fitzjames, in support of his rule.—It being the attorney's duty to enter and docket the judgment, he was the proper person to be called upon by the rule. [*Vaughan*, J.—Why was not the application made at chambers?] It was; and Mr. Justice Bosanquet refused to make an order. [*Vaughan*, J.—Then the question has already been adjudicated upon.]

TINDAL, C. J.—The rule should have called upon the plaintiff himself, and not upon his attorney.

The rest of the court concurring—

Rule discharged, with costs.

1838.

Wednesday, June 13th.

In an action against an auctioneer to recover back a deposit, the vendor claiming to be entitled to the money, the defendant obtained a rule under the interpleader act. The third party subsequently abandoning his claim:—Held, that the defendant, having acted bonâ fide, was entitled to his costs out of the fund—the plaintiff having a remedy over against the third party.

PITCHES *v.* EDNEY.

THIS was an action brought against the defendant, an auctioneer, to recover the balance of a deposit paid on the sale by auction of certain leasehold property belonging to one John Mousley, the plaintiff refusing to complete the purchase on the ground of misdescription and of alleged defects in Mousley's title, amongst others that the lease under which Mousley held was not duly registered. The defendant had notice from Mousley not to return the deposit; and an action was commenced by Mousley against the plaintiff to recover the residue of the purchase money.

On the 21st April, the defendant obtained a judge's order under the interpleader act, 1 & 2 Will. 4, c. 58, directing that 29*l.* (the balance of the deposit remaining in the defendant's hands after deducting 5*l.* 8*s.* paid for auction-duty, and 5*l.* advanced by the defendant to Mousley with the consent of the plaintiff), should be paid into court, that Mousley should deliver a declaration in the action commenced by him against the plaintiff, and proceed to trial at the next sittings, and that the costs of the plaintiff and of the application for the order should be costs in the cause. Mousley failing to proceed with his action against the plaintiff, and becoming insolvent, a second order was made on the 18th May, under the 3rd section of the act, rescinding the order of the 21st April, and directing that any claim of Mousley against the defendant should be barred, and that the defendant should take the 29*l.* out of court, and have four days time to plead to this action.

Wilde, Serjeant, on the part of the defendant, on a former day in this term, obtained a rule calling on the plaintiff to shew cause why all further proceedings in

this cause should not be stayed; why it should not be referred to one of the Masters to tax the defendant his costs of the action and of the application to the court; why the defendant should not be at liberty to receive the amount of such costs out of the *29l.* paid into court under the first-mentioned order, if the said sum of *29l.* should exceed the amount of such costs, or the whole of the said sum of *29l.* if such costs should exceed that amount; why so much of the order of the 18th May as directed that the defendant should be at liberty to take out of court the said sum of *29l.* should not be discharged; and why the plaintiff should not be at liberty to take out of court so much as should remain (if any) of the said sum of *29l.*, after deducting therefrom the defendant's costs when taxed. In support of the defendant's claim to his costs out of the fund in dispute, he cited *Duear* v. *Mackintosh*, 3 M. & Scott, 174, and *Cotter* v. *The Bank of England*, 3 M. & Scott, 180.

Erle shewed cause.—The rule laid down in the cases cited only applies where the deficiency in the fund or in the proceeds of the thing in dispute may be made up by the unsuccessful party, and cannot govern a case like this, where there is no unsuccessful party to whom the plaintiff can have recourse. Here, both the parties are equally innocent. There can be no good reason therefore why the one should be made to bear the costs of the other. *Lucas* v. *The London Dock Company*, 4 B. & Ad. 378.

Wilde, Serjeant, in support of his rule.—A party fairly interpleading is clearly entitled to his costs. Such was always the rule in equity—*Aldridge* v. *Mesner*, 6 Ves. 418; *Farebrother* v. *Pratter*, 1 Daniell, 64—and such has been the practice of this and the other courts under the statute. The stakeholder's right to costs is not to be affected by

1838.

PITCHER v. EDNEY.

the nonappearance or insolvency of one of the contending parties. In *Dwear* v. *Mackintosh*, Tindal, C. J., says: "It seems to me that the better course for us to pursue with respect to costs would be to follow, as nearly as possible, the practice of the courts of equity. There, where it appears that all parties have acted properly, the fund is charged with the costs. I therefore think that in this case the fund should in the first instance be charged with the defendant's expenses of the motion. We cannot throw the costs upon either of the contending parties, inasmuch as it is not yet ascertained which is in the wrong." The same course was followed by this court in *Cotter* v. *The Bank of England* and *Dabbs* v. *Humphries*, 1 Scott, 325, 1 New Cases, 412, and by the court of King's Bench in *Parker* v. *Linnett*, 2 Dowl. 562.

TINDAL, C. J.—The act in question, at the close of the third section, gives the court authority "to make such order between the plaintiff and the defendant, as to costs and other matters, as may appear just and reasonable." This court has in several cases gone the length of saying that the fund shall in the first instance bear the costs of the party fairly applying under the act, the deficiency being ultimately made good by the party against whom the issue is found. The court of King's Bench, it seems, have done the same. The question now before us is, whether or not the rights of the parties are altered by the nonappearance of the third person to support his claim. I am not inclined on this occasion to lay down any general rule. The statute seems to have given us considerable latitude. If it appeared that the plaintiff, by reason of the absence of the third party, was left without indemnity, that might perhaps alter the original position of the parties. But here the plaintiff has a right of action against Mousley upon the contract of purchase, in which action the sum deducted would be part of the damages he would be en-

1836.

PITCHER v. EDNEY.

titled to recover. The insolvency of Mousley is not to be taken into account. I therefore think there is nothing in the present case to take it out of the course already marked out, and therefore that this rule must be made absolute.

VAUGHAN, J.—I am of the same opinion. I think we should be giving a narrow and inequitable construction to this act if we were to hold that the costs of the stakeholder, where he has conducted himself with fairness and propriety, are not to be paid out of the fund.

COLTMAN, J.—I wish to be understood as cautiously guarding myself from laying down any general rule as to the payment of costs out of the fund, where the third party does not appear to support or relinquish his claim. If the court had power to recompense the plaintiff, by giving him a remedy over against such third party, there could be no difficulty. But I think the court has no power to make such an order: the act empowers the court to make such order *between the defendant and the plaintiff*, as to costs and other matters, as may appear just and reasonable. If both parties are equally innocent, I do not see why the plaintiff should suffer. The act gives the stakeholder a considerable boon: and I incline rather to think that the plaintiff should recover the whole of his property. However, I reserve my opinion until a fit occasion shall present itself for considering the matter. Here the plaintiff has a remedy against the third party. It therefore seems reasonable that the defendant should receive his costs out of the fund, and that the plaintiff should be left to his action.

Rule absolute accordingly (40).

(40) It is not easy to perceive how the rights of the parties are really affected by the existence or non-existence of a remedy over against the third person—seeing that either of them would have a right of action against him.

1838.

Thursday, June 14th.

A judgment signed on the morning after the time for pleading has expired, whilst the parties are attending a judge on a summons for time to plead returnable before the judgment is actually signed —is irregular.

ABERNETHY *v.* PATON.

THE time for pleading in this case expired on Saturday, the 12th May. On Friday, the 11th, the defendant took out a summons for time to plead, returnable at 12 o'clock on Saturday, the 12th. This summons not having been served on the plaintiff's attorney in time to procure his attendance on the Saturday, another summons was taken out for the same purpose, returnable at 11 o'clock on Monday, the 14th. The plaintiff's attorney attended the hearing at 12 o'clock on that day, and successfully opposed the summons. On coming out of the judge's chambers the defendant's attorney handed to the plaintiff's attorney a plea of the general issue, which the latter refused to receive, saying that he had already signed judgment. The defendant applied to Coltman, J., who made an order setting aside the judgment.

Petersdorff, on a former day, obtained a rule nisi to discharge this order. He submitted that the summons for time to plead was no stay of proceedings, and therefore that the plaintiff had a clear right to sign judgment on the Monday at 11 o'clock.

W. H. Watson now shewed cause.—A judge's summons returnable before judgment is signed operates as a stay of proceedings. In *Morris* v. *Hunt*, 1 Chit. 93, where the time to plead was not out till the 18th January, and the defendant took out a summons for further time, returnable at 11 o'clock in the morning of the 19th, and the plaintiff signed judgment at 3 o'clock in the afternoon; it was held that the judgment was irrregular. So, in *Wells* v. *Secret*, 2 Dowl. 447, a summons *to plead several matters* was held to be a stay of proceedings, if returnable at the time of the opening of the office on the day after the time for pleading

1838.

ABERNETHY v. PATON.

expires. Parke, J., there says: "The only point in this case is, whether the summons *to plead several matters*, returnable at eleven o'clock on the day after the time for pleading has expired is a stay of proceedings when the clock strikes eleven, that being the hour at which the judgment office opens. In case of obtaining *time to plead*, it *would* operate as a stay of proceedings. The question therefore is decided, unless there is a difference between a summons for *time to plead* and a summons *to plead several matters*." Several authorities to the same effect are referred to in Tidd's Practice, 9th edit. 470, 471.

Petersdorff was heard in support of his rule.

TINDAL, C. J.—The plaintiff surely could have no right to sign judgment whilst the parties were attending before a judge. *Wells* v. *Secret* comes very near this case. The judgment is clearly irregular. Such sharp practice ought to be visited with costs.

The rest of the court concurring—

Rule discharged with costs.

FISHER *v.* DEWICK and Another.

Wednesday, June 13th.

Particulars of objections to a patent, under the 5 & 6 Will. 4, c. 83, s. 5, must be such as to convey to the plaintiff fair and reasonable information, and more definite than that conveyed by the defendant's pleas.

THIS was an action on the case for the infringement of a patent obtained by one William Sneath for improved machinery for the manufacture of bobbin-net lace, of which patent the plaintiff was the assignee.

The defendants pleaded—first, not guilty—secondly, that W. Sneath in the declaration mentioned, did not by an instrument in writing under his hand and seal particularly describe and ascertain the nature of his alleged invention—thirdly, that the alleged invention was not an im-

1838.

FISHER v. DEWICK.

provement in such machinery for making bobbin-net lace —fourthly, that W. Sneath was not the true and first inventor of the alleged improvements in the machinery— fifthly, that the alleged invention was of no use, benefit, or advantage to the public whatsoever—sixthly, that the alleged invention was not, at the time when the letters patent were granted, a new invention—seventhly, that W. Sneath did not assign, transfer, and set over unto the plaintiff all that his said invention and also the said letters patent.

The following notice of the objections on which the defendant meant to rely, was delivered pursuant to the statute (41):—

1. That the grantee of the said patent was not the true or first inventor of the whole or any part of the improvement or improvements described in the declaration, letters patent, specification, or either of them.

(41) 5 & 6 Will. 4, c. 83, s. 5, by which it is enacted, "that, in any action brought against any person for infringing any letters patent, the defendant, on pleading thereto, shall give to the plaintiff, and in any scire facias to repeal such letters patent, the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action; and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively at such trial, unless he prove the objections stated in such notice: Provided always, that it shall and may be lawful for any judge at chambers, on summons served by such defendant or plaintiff on such plaintiff or defendant respectively to shew cause why he should not be allowed to offer other objections whereof notice shall not have been given as aforesaid, to give leave to offer such objections, on such terms as to such judge shall seem fit."

The 6th section provides, "that, in any action brought for infringing the right granted by any letters patent, in taxing the costs thereof regard shall be had to the part of such case which has been proved at the trial, which shall be certified by the judge before whom the same shall be had, and the costs of each part of the case shall be given according as either party has succeeded or failed therein, regard being had to the notice of objections, as well as the counts in the declaration, and without regard to the general result of the trial."

2. That the improvements alleged to have been invented by the said William Sneath were not invented by him.

3. That the said improvements were not, at the time of the granting of the letters patent, nor was any part thereof, new.

4. That, if any part thereof were new, the same was useless or unnecessary, and not the ground of any patent at all; and therefore ought not to have been described in the specification as part of the said improvements.

5. That the specification did not describe with sufficient certainty and precision the nature of the supposed improvements or the manner in which they were performed; and particularly that they were not applicable to every sort and description of the machinery to which in the specification they were said to be applicable.

6. That the said improvements, or some of them, had been publicly and generally used long before the granting of the said letters patent.

7. That the alleged improvements, and the means of enabling the public to avail themselves of them, were so imperfectly described in the specification or instrument in writing in the declaration mentioned, that a machine could not be made by the description in the specification to produce the kind of lace therein mentioned.

8. That it was stated in the said specification that the said improvements were appliable to machinery for making bobbin-net lace, whereas there were several machines for making bobbin-net lace to which there was no adaptation of the alleged improvements stated or set out in the specification, and to which those improvements could not be applied by the means and in the manner stated in the specification.

9. That the said letters patent, as appeared by the title thereof, were granted to the said William Sneath for having invented certain improvements in machinery for

1838.

FISHER v. DEWICK.

the manufacture of bobbin-net lace; whereas the said specification did not shew any improvement in such machinery for the making bobbin-net lace.

10. That the machinery for making bobbin-net lace was complete in itself, and not improved by any part of the inventions for which the said letters patent were granted.

11. That such of the machinery as was set out in the said specification as applicable to the manufacture of bobbin-net lace, was not new, but was in general use before the date of the letters patent.

12. That the invention for which the said letters patent were granted was more extensive than that shewn in the specification.

13. That the invention described in the said letters patent did not correspond with the invention described in the said specification.

14. That the said William Sneath claimed as his invention those parts only of the machine which were described in the said specification by numeral figures; whereas many of the parts which were noted by letters in the said specification must form part of his alleged invention, or the same would be incomplete.

15. That many directions were inserted in such specification which were altogether useless, and only tended to mislead.

16. That the alleged invention was not an improvement, and ought not to be the subject of a patent.

17. That, should the said alleged invention, or any part thereof, be an improvement, the same was not of sufficient consequence to be the subject of a patent.

18. That a certain part or parts of the said alleged invention had been, before the date of the said letters patent, combined, and in common use, both severally and together.

19. That the description of certain parts of the said alleged improvement, as set forth in the said specification,

and the description thereof as set forth in the plans thereto annexed, were at variance with each other, and did not correspond.

20. The defendants will further shew all such objections to the said patent, and the specification mentioned in the declaration, as shall be considered by the court to be admissible under their several pleas, and whereof the pleas themselves are sufficient notice.

The plaintiff deeming the above notice not to be a sufficient compliance with the statute, took out a summons calling upon the defendants to shew cause before a judge at chambers why they should not within a limited time furnish "an intelligible and true statement of the objections they meant to rely on at the trial." Vaughan, J., before whom the summons was heard, made an order requiring the defendants to deliver more specific objections within two days.

Summons.

Order of Vaughan, J.

Wightman, on a former day in this term, obtained a rule nisi to rescind this order. He conceded that it was too late, after the decision of this court in *Bulnois* v. *M'Kenzie*, 5 Scott, 419, 4 New Cases, 127, 6 Dowl. 215, to contend that a judge at chambers had not power to make orders of this description: but he submitted that the object of the statute was not to tie the defendant to any very strict precision in the statement of his objections; and that the effect and validity of them was more properly a question for the judge at Nisi Prius.

Wilde, Serjeant, and *Hoggins*, shewed cause.—The question as to the jurisdiction of the court or a judge was fully discussed and set at rest by the case of *Bulnois* v. *M'Kenzie*. The only matter for discussion, therefore, is, whether the particulars that have been delivered in this case are or are not a compliance with the statute. Particulars have been required to be given even in criminal

1838.

FISHER v. DEWICK.

cases (42). What is the construction the courts of law put upon general words of similar import in statutory provisions for the protection of magistrates, commissioners, canal and dock companies, and the like? A notice complying with the mere words of the act, and evading its obvious intention, clearly will not do. The intention of this act was, that the plaintiff should be apprised of the real nature of the scrutiny to which his patent was to be subjected; not that the proceedings should be incumbered with a mere formal notice, the only effect of which would be to perplex and mislead the plaintiff and create useless expense. To hold particulars framed like these to be a compliance with the statute, would be a practical repeal of a very wholesome provision. The statute could not enter into a detail of what the notice should contain: the circumstances of each case are so infinitely various. [*Tindal*, C. J.—These particulars certainly convey no real information. Some of them are altogether unintelligible; others are as wide as the general issue.] The fourth objection is, that, if any part of the invention were new, the same is useless or unnecessary, and not the ground of a patent. Surely it is not unreasonable to call upon the defendants to give some indication of the parts that are supposed to be useless or unnecessary. The sixth is, that the said improvements, or some of them, have been publicly and generally used long before the granting of the letters patent: not shewing what parts have been in public use, or where; and it is notorious that a pretended user is one of the most difficult parts of the inquiry in cases of this sort. The same want of particularity pervades the whole of the objections: they are drawn with such ingenious obscurity as to be more perplexing than an entire absence of particulars.

(42) See Johnson v. Birley, 5 B. & A. 540, 1 D. & R. 174; Rex v. ———, 1 Chit. 698; Anon. 1 Chit. 699.

1838.

FISHER v. DEWICK.

Wightman, in support of his rule.—Before the passing of this act and the making of the new rules of pleading, a patentee laboured under very considerable difficulty in the maintenance of his patent right: it seemed to have been the policy of the law to discourage monopolies. Under a plea of the general issue, the plaintiff was always uncertain whether the defendant meant to deny the fact of the infringement, or to rely on the insufficiency of the patent; and, in the latter case, he had no means of knowing what were the particular objections intended to be urged against the patent. The statute was passed with a view to relieve the patentee from this dilemma—to give him notice whether any and what objections to his patent existed (43). It never could have been the intention of the legislature to impose upon the defendant the difficulty and the injustice this order would impose upon him—ripping up and exposing his whole line of defence. The defendant has an undoubted right to make as many objections as he pleases: the statute does not restrict him; to what extent, then, will the court do so? Reference has been made to the case of notices of action to justices and others. Who ever heard of an application to the court or a judge for a more specific notice of action? or of any objection to the sufficiency of the notice, except as a ground of nonsuit at Nisi Prius. [*Tindal,* C. J.—The object of the notice of action is, to give the defendant an opportunity of tendering amends. Here, the object is, to give the plaintiff better information as to the objections he will be called upon to meet, than the pleas furnish.] The defendant is asked to point out what particular parts of the machine are useless.

(43) It was stated in the course of the argument that when this act was first introduced into Parliament, the new rules of pleading were not in operation.

The Bill was brought into the House of Commons by Mr. Godson early in the session of 1833. The new rules of pleading were promulgated in Hilary Term, 1834, and came into operation on the first day of Easter Term in that year.

1838.

FISHER v. DEWICK.

The alleged improvements consist of ninety-four parts. Suppose they are all useless, and that the best machines now existing have none of these parts, and yet make better lace of the description in question than the plaintiff's machine? [*Tindal*, C. J.—Then the particulars are untrue: they only allege that *certain parts* of the invention are useless or unnecessary.] It is difficult to perceive how there could be a mere bona fide compliance with the statute.

TINDAL, C. J.—I think this rule must be discharged. The question is whether the matters alleged in this notice are so indefinite and uncertain as to be calculated rather to mislead than to assist the plaintiff in shaping his course at the trial. The object of this statute certainly was not to deprive the defendant of any ground of defence; but one object at least was to lessen the expense of the trial, and to prevent the plaintiff from being surprised by objections to his patent of which he had no previous intimation or knowledge. When the statute requires a notice of objections to be given, it must mean such a notice as shall convey to the opposite party real and honest information of the grounds upon which it is sought to avoid the patent. In the present case, some of the objections are certainly much more likely to embarrass than to enlighten the plaintiff: they are evidently framed with that view. For example, the 4th objection states, "that, if *any part* of the invention were new, *the same* was useless or unnecessary, and not the ground of any patent at all, and therefore ought not to have been described in the specification as part of the improvements;" the 6th, "that the said improvements, *or some of them*, had been publicly and generally used long before the granting of the letters patent;" the 18th, "that *a certain part or parts* of the said alleged invention had been, long before the date of the said letters patent, combined, and in common use, both

severally and together;" and the 7th, "that the alleged improvements, and the means of enabling the public to avail themselves of them, were so imperfectly described in the specification or instrument in writing in the declaration mentioned, that a machine could not be made by the description in the specification to produce the kind of lace therein mentioned." Let the defendant point out specifically and intelligibly the particular parts which he means to contend are useless or not new, and in what consists the imperfections he complains of in the specification. Others of the objections are equally vague and uncertain: but, if any one of them were so, it would be enough to warrant its being sent back.

1838.

FISHER v. DEWICK.

PARK, J.—This application has in it nothing that is new in principle. In the particular section of the statute which applies to this case, the patentee alone seems to have been the object of legislative attention. I think the provision a most wise and just one, and this case most clear.

VAUGHAN, J.—I am of the same opinion. When the parties were before me at chambers, my jurisdiction to make the order was questioned. It is, however, now admitted. If the statute requires the defendant to give the plaintiff any greater degree of notice than the pleas have already conveyed, this notice is clearly insufficient. Dolus versatur in generalibus.

COLTMAN, J.—I am of the same opinion. It is incumbent on the court to see that the objections are stated in a distinct and generally intelligible form, that the plaintiff may not be taken by surprise. It is manifestly more convenient that the matter should be settled before the parties go down to trial. I agree that the defendant is not to be precluded from stating any number of objections

1838.

FISHER v. DEWICK.

he may be advised: but they must be stated in intelligible terms. And I think no person who is well advised would go down to trial with so many and such frivolous objections as some of these are.

Rule discharged, the costs to be costs in the cause.

Thursday, June 14th.

DAWES *v.* SOLOMONSON.

A writ of capias was issued against the defendant at the suit of C. D., an attorney, with an indorsement stating that the writ was issued by A. B. and C. D., of &c., attornies for the plaintiff: —Held, that this indorsement was a sufficient compliance with the statute 2 Will. 4, c. 39.

BUTT, on former day, obtained a rule calling upon the plaintiff to shew cause why the writ of capias in this case should not be set aside for irregularity. The irregularity suggested was, that, in the indorsement on the writ pursuant to the 2 Will. 4, c. 39, s. 12, the writ was stated to have been issued by a firm which included the plaintiff.

Petersdorff shewed cause.—An indorsement in the name of a firm is clearly sufficient—*Pickman* v. *Collis*, 3 Dowl. 429; *Hartley* v. *Rodenhurst*, 4 Dowl. 748: and indeed it is difficult to perceive how the intention of the statute—that the party might know to whom he was to pay the debt and costs—could better be satisfied. In *James* v. *Swift*, 6 D. & R. 625, 4 B. & C. 681, 2 C. & P. 237, a notice of action against a magistrate under the 24 Geo. 2, c. 44, s. 1, signed in the name of a firm, was held sufficient.

Butt, in support of his rule.—The 12th section of the 2 Will. 4, c. 39, provides that every writ issued by authority of that act shall be indorsed with the name and place of abode of the attorney actually suing out the same; but, in case no attorney shall be employed for that purpose, then with a memorandum expressing that the same has been sued out by the plaintiff in person, &c. The indorsement here does not comply with either branch of this sec-

tion, or with the schedule No. 4. It should be a strict and literal compliance. The plaintiff, if carrying on business alone, could not state himself to be his own attorney, he must state that he sues out the writ in person; and the rule must be the same where he is a member of a firm.

TINDAL, C. J.—I incline to think that the indorsement in this case is sufficient. It is certainly according to the intention, and sufficiently near to the form pointed out by the statute. Better information is given by this mode of indorsement than by that which Mr. Butt would suggest.

PARK, J.—The object of the statute was to give to the defendant full information as to the place where he might go for the purpose of settling the action. The indorsement here is certainly not quite so accurate as it should be: but still I think it a sufficient compliance with the act.

VAUGHAN, J.—The indorsement was required for the purpose of giving the defendant an opportunity of settling, and that he might know distinctly whether the writ was sued out by an attorney or by the plaintiff in person. In a case like this, I think the act is sufficiently complied with by the form of indorsement here adopted.

COLTMAN, J.—The objection is a very strict one, and one to which I would not willingly give way. I think this indorsement will do. The 12th section of the 2 Will. 4, c. 39, provides that every writ issued by authority of that act "shall be indorsed with the name and place of abode of the attorney actually suing out the same;" but, "in case no attorney shall be employed for that purpose, then with a memorandum expressing that the same has been

1838.

DAWES v. SOLOMONSON.

sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be:" thus requiring more particular information where the writ is sued out by the plaintiff in person. It seems to me that the first part of the provision was intended to apply to all cases where an attorney was employed; the second, where the writ was sued out by a layman. Here the writ is sued out by an attorney: and the indorsement must be qualified so as to bring it within the first part of the clause.

Rule discharged.

Thursday, June 14th.

SCOTT *v.* STALEY.

Debt on a bond conditioned for payment of money by instalments: the breaches were assigned in the replication, under the statute 8 & 9 Will. 3, c. 11:—Held, that the jury might assess the damages without a special venire.

THIS was an action of debt on a bond for 600*l.* The defendant, after setting out on oyer the condition of the bond, which was for the payment of money by certain instalments, pleaded performance and fraud and covin. The replication assigned for breaches the non-payment of three several instalments.

The award of the venire was in the usual form: "Thereupon the sheriff is commanded that he cause to come here on the day of twelve &c., by whom &c., and who neither &c., to recognize &c., because as well &c."

At the trial a verdict was found for the plaintiff, damages 1*s.*, and the damages on the breaches were assessed at 189*l.*

Chandless, on a former day in this term, obtained a rule calling on the plaintiff to shew cause why the judgment should not be arrested, or why a venire de novo should not be awarded, on the ground that by the jury process the jury were only required to try the issues, and not, as directed by the statute 8 & 9 Will. 3, c. 11, s. 8, to assess

the damages also—Tidd's Practice, 9th edit. 721, 781; Appendix to 9th edit. 243, 281; Chitty on Pleading, 6th edit., Vol. 1, 586, Vol. 3, 1195.

Barstow shewed cause.—The first branch of the statute provides, that, "in all actions in any court of record upon any bond, or on any penal sum, for non-performance of any covenants or agreements contained in any indenture, deed, or writing, the plaintiff *may* assign as many breaches as he shall think fit; and the jury shall assess not only such damages and costs as have heretofore been usually done, but also damages for such of the breaches as the plaintiff upon the trial of the issues shall prove to have been broken," &c. In 1 Wms. Saund. 58, n. (1), it is said: "It is now held, notwithstanding some cases to the contrary, that the words '*may assign*' in the first part, and '*may suggest*,' in the subsequent part of the statute, are compulsory upon the plaintiff. For, the act was made in favour of defendants, and is a remedial law calculated to give plaintiffs relief up to the extent of the damages sustained, and to protect defendants against the payments of further sums than are in conscience due; and also to take away the necessity of proceedings in equity to obtain relief against an unconscientious demand of the whole penalty in cases where small damages only have accrued. And therefore it is not in the plaintiff's power to refuse to proceed according to the statute, but he *must* assign the breach of such covenants as he proceeds to recover satisfaction for; and, if the defendant plead to issue, the jury upon the trial *must* assess damages for such of the breaches assigned as the plaintiff shall prove to have been broken, otherwise the verdict is erroneous, and a venire de novo will be awarded." The present case comes within the first branch of the statute. The jury are impannelled to try the issues, and, being there, they are to assess the damages for the breaches assigned and proved. The assessment alluded to in the forms in Tidd

1838.

SCOTT v. STALEY.

and in Chitty, has reference only to the *suggestion* of breaches under the second branch of the statute. *Quin* v. *King*, 1 M. & Welsby, 42, is precisely in point. There the breach was assigned in the declaration, and, upon non est factum pleaded, a verdict was found for the plaintiffs, and the damages upon the breach assessed; and the same objection was taken as here, viz. that the jury had no power to assess the damages, the award of venire being only ad triandum. Parke, B., delivering the judgment of the court, after referring to the statute, said: "There are two classes of cases contemplated by the statute, one in which breaches may be assigned in the declaration, the other in which they may be suggested on the roll: if they are assigned, the jury may assess the damages without a special venire, but, where they are suggested, there ought to be a special venire to enable them. So the point stands without referring to any authorities. But in the case of *Parkins* v. *Hawkshaw*, 2 Stark. N. P. C. 381, the very point now in question arose before Lord Tenterden, who said that he recollected a case on the Western Circuit where it was so contended, and that he also thought that this form of the record was correct." The court will if necessary read "by whom &c." thus—"by whom the issues shall be tried and the damages assessed." Besides, the defect, if any, is aided after verdict by the statute 8 Hen. 6, c. 12—*Walsh* v. *Upton*, Cro. Eliz. 259.

Chandless, in support of his rule.—By whom &c. means "by whom the truth of the matters may be better known."

TINDAL, C. J.—I think we cannot get over the case of *Quin* v. *King*: the precise point was there argued and determined after consideration.

The rest of the court concurring—

Rule discharged.

1838.

Thursday, June 14th.

IRELAND *v.* THOMPSON.

In an action for money had and received, the defendant pleaded, amongst other things, payment of 5,000*l.* in satisfaction of the plaintiff's demand:—The court compelled him to furnish particulars of the alleged payments.

ASSUMPSIT for money had and received. Pleas—first, non assumpsit—secondly, payment of 5,000*l.* in satisfaction—thirdly, a set-off for monies due to the defendant and one H. W., by whom the alleged promises were jointly made.

Wilde, Serjeant, upon an affidavit of the plaintiff that no such payments as those alleged had ever been made, and that he could not safely proceed to trial until particulars of such alleged payments were delivered to him, obtained a rule nisi to strike out the second plea unless such particulars were furnished within a given time.

Greaves shewed cause.—This is an attempt to engraft upon a plea of payment the doctrine applicable to a plea of set-off, the effect of which is wholly different; the plea of set-off being in effect a cross action, and both plaintiff and defendant being actors. [*Tindal*, C. J.—The new rule requiring payments to be pleaded has tended very much to promote justice: its utility will be much impaired if particulars may not be called for.] The rule of Trinity Term, 1 Will. 4, s. 6, which provides for the annexation to the record of the particulars of set-off, makes no mention of particulars of payment: expressio unius est exclusio alterius. Some specific ground should at least be laid for asking the indulgence, and imposing upon the defendant that which may be a serious difficulty.

Wilde, Serjeant, in support of his rule, was stopped by the court.

TINDAL, C. J.—Without professing to lay down any general rule upon the subject, I must confess, that, when

1838.

IRELAND v. THOMPSON.

the plaintiff swears that he is unable to proceed with his action without being furnished with the particulars of the alleged payments, I see nothing unreasonable or hard upon the defendant in requiring him to furnish them.

The rest of the court concurring—

Rule absolute.

Thursday, June 14th.

PHILLIPPS *v.* YEARDLEY.

Issue was joined in Easter Term, and notice of trial given for the second sitting in Trinity Term:—Held, that the defendant was not entitled to move for judgment as in case of a nonsuit until Michaelmas Term.

ISSUE was joined in the last term, and notice of trial was then given for the second sitting in this term. After the day appointed for the second sitting—

Atcherley, Serjeant, for the defendant, obtained a rule nisi for judgment as in case of a nonsuit, the plaintiff not having gone to trial pursuant to his notice.

Humfrey now shewed cause.—The motion is premature: the plaintiff is not bound to take more than one step in a term. The practice is settled, that a motion for judgment as in case of a nonsuit for not proceeding to trial, cannot be made in the term for which notice of trial is given—*Isaac* v. *Goodman*, 1 C. & M. 494, 3 Tyr. 559, 2 Dowl. 34; *Marshal* v. *Forster*, 2 Dowl. 228, 2 C. & M. 213; *Preedy* v. *M'Farlane*, 1 C. M. & R. 819, 2 Dowl. 216.

Atcherley, Serjeant, in support of his rule.—The question is whether or not the plaintiff has made default, in having given notice of trial, and having failed to comply with it. In *Isaac* v. *Goodman*, the motion was made in the same term in which the notice of trial was given: and in *Preedy* v. *M'Farlane*, there was time to cure the default when the rule was moved for. Whether the default be in not proceeding to trial within the term, or in not complying with his notice, the plaintiff here is equally and completely in default.

1838.

PHILLIPPS v. YEARDLEY.

TINDAL, C. J.—Good sense is certainly in favour of the defendant; but the settled practice is against him; and I think it is better to adhere to a known and established rule which has no real inconvenience, though we might be better satisfied if it were the other way. So early as the case of *Da Costa* v. *Ledstone*, 2 H. Blac. 558, this court said "that the practice was now settled, that the defendant could not apply for judgment as in case of a nonsuit before the third term, and, though the plaintiff was too late to try in the second term, they would not punish a default before it was actually committed." I think the rule must be discharged: the costs will be costs in the cause.

PARK, J.—I agree that it is better to adhere to the established practice, however repugnant it may be to good sense.

VAUGHAN, J.—The defendant will be entitled to make this motion on the first day of next term.

Rule discharged.

WETTENHALL *v.* GRAHAM.

Thursday, June 14th.

A defendant who is under terms to plead issuably, cannot plead that the plaintiff has been discharged under the insolvent debtors act, and that the cause of action has passed to his assignees.

TRESPASS for breaking and entering the plaintiff's messuage and warehouse, and taking away his goods. The defendant, who was under terms to plead issuably, pleaded six pleas: the fifth in substance stated that the plaintiff, being a prisoner, petitioned the court for the relief of insolvent debtors, and executed a conveyance and assignment of all his right, title, and interest in his real and personal estate and effects to the provisional assignee, whereby the cause of action vested in such provisional assignee.

The plaintiff, conceiving the above not to be an issuable plea within the meaning of the judge's order, signed judgment.

1838.

WETTENHALL v. GRAHAM.

Addison, on a former day, obtained a rule nisi to set aside the judgment for irregularity, on the grounds that the plea was issuable, and that at all events the point should have been taken when the parties were before a judge at chambers upon a summons for leave to plead several matters.

W. H. Watson shewed cause.—The fifth is clearly not an issuable plea: it does not go to the merits. And where a defendant is under terms to plead issuably, and delivers several pleas, and any one of them is not issuable, it vitiates the whole, and the plaintiff may sign judgment —*Waterfall* v. *Glode*, 3 T. R. 305. The damages to be recovered in this action would not pass by the assignment to the provisional assignee—*Clark* v. *Calvert*, 8 Taunt. 742.

Addison, in support of his rule.—For any injury to the estate of an insolvent or bankrupt before his insolvency or bankruptcy, the right of action passes by the assignment to his assignee—*Smith* v. *Coffin*, 2 H. Blac. 444. Any plea that shews that the plaintiff has no right of action, is a plea to the merits. In *Staples* v. *Holdsworth*, 5 Scott, 432, 4 New Cases, 144, it was held that a defendant who is under terms to plead issuably, cannot plead the bankruptcy of *one* of the plaintiffs after the commencement of the action. But that was clearly not a plea to the merits.

Cur. adv. vult.

TINDAL, C. J., now said that the court felt no difficulty in holding that the plea in question was not an issuable plea; and that the objection was available in the present form.

Addison prayed and obtained leave to amend by withdrawing the obnoxious plea (producing an affidavit of merits), upon the usual terms.

Rule accordingly.

1838.

Thursday, June 14th.

STAPLES and Another *v.* HOLDSWORTH.

The court allowed the plaintiffs to amend their particulars, in an action for money had and received by the defendant whilst in their employ as clerk or agent at Mexico, by the insertion of fresh items arising within the period embraced by the former particulars, though ten years had elapsed—it appearing that the plaintiffs had been deluded by an account rendered by the defendant himself.

THIS was an action of assumpsit for money had and received by the defendant to the use of the plaintiffs. The declaration was delivered in Trinity Term, 1827, together with particulars of the plaintiffs' demand, by which the plaintiffs claimed a variety of sums, in the whole amounting to 7,000*l.*, alleged to have been received by the defendant to their use between the 2nd January, 1824, and the 19th January, 1827. The plaintiffs' case being to be made out by evidence to be obtained in Mexico, where the defendant had been acting as their clerk or agent, and where the money was alleged to have been received, the plaintiffs found themselves unable to proceed with the cause until the beginning of 1827, when they gave a term's notice of their intention to proceed; one of them having in the mean time been to Mexico (44).

In Easter Term last, the plaintiffs obtained a judge's order to amend the particulars by the insertion of additional items to the amount of 10,000*l.*, alleged to have come to the defendant's hands within the period comprised in the particulars already delivered.

Maule, upon an affidavit that the action was founded upon a dispute as to the amount of the defendant's salary, and that the bill of particulars already delivered was prepared from an account furnished by the defendant himself, obtained a rule calling on the plaintiffs to shew cause why the order for amending the particulars should not be rescinded.

Wilde, Serjeant, now shewed cause, upon an affidavit stating, that, in August, 1833, the defendant had been employed by the plaintiffs in a confidential situation as

(44) See Staples v. Holdsworth, 5 Scott, 432, 4 New Cases, 144.

1838.

STAPLES v. HOLDSWORTH.

their agent at Mexico; that, while acting in such capacity, he received various sums of money for which he omitted duly to account; that there never was any dispute as to the amount of his salary; that the only means the plaintiffs at the time of the commencement of the action had of ascertaining the amount of the sums so received by the defendant, was, an account which the defendant had furnished, and on which the original particulars were framed, but which they had since ascertained to be incorrect, the defendant having received other sums to a large amount, of which no account had been rendered.

Maule and *Greenwood*, in support of the rule.—After having allowed the cause to slumber for ten years, the plaintiffs now seek to introduce new matter—a new cause of action—to which the statute of limitations would be a bar if a fresh action had been commenced. It would be manifestly unjust thus indirectly to deprive the defendant of a defence upon the merits. He may after so great a lapse of time be unprepared with evidence to meet this new demand: *his vouchers may have been burnt*. The application is entirely without precedent; and all analogy is opposed to it. Amendments are never permitted for the purpose of introducing a new cause of action; but only for the purpose of rectifying mistakes—*Bearecroft* v. *The Hundreds of Burnham and Stone*, 3 Lev. 347; *The Executors of the Duke of Marlborough* v. *Wichmore*, 2 Str. 890; *Doe* d. *Hardman* v. *Pilkington*, 4 Burr. 2447; *Goff* v. *Popplewell*, 2 T. R. 707; *Steel* v. *Sowerby*, 6 T. R. 171; *Maddock* v. *Hammett*, 7 T. R. 55; *Holland* v. *Hopkins*, 2 B. & P. 243; *Brown* v. *Crump*, 6 Taunt. 300; *Freen* v. *Cooper*, 6 Taunt. 358; *Billing* v. *Flight*, 6 Taunt. 419; *Atkinson* v. *Bell*, 8 B. & C. 277, 2 M. & R. 292; *Sweeting* v. *Halse*, 4 M. & R. 383; *Green* v. *Milton*, 4 B. & Ad. 369; *Breckon* v. *Smith*, 1 Ad. & E. 488. In *Sweeting* v. *Halse*, which was an action upon a bill of exchange, it

1838.

STAPLES v. HOLDSWORTH.

appeared that the original bill had been cancelled, and a new one substituted, which was not declared upon: the defendant thereupon had a verdict; and the court refused to allow the plaintiff to amend, upon payment of costs, by adding counts upon the new bill: Lord Tenterden saying: "I think if we were to make this rule absolute, we should be going further than the courts have ever gone hitherto in cases of this description. There will be no end to applications of this nature, if they are once yielded to. The safer course, and that which will compel parties to pay some attention to their own cases, will in my opinion be, to refuse to assist them in so advanced a stage of the cause. The plaintiff must be left to his remedy by a new action. I am sorry for it; because the objection to the amendment is against the merits of the case." To uphold that which this order has granted will be introducing a new cause of action, and is strictly analogous to the introduction of a new count. The declaration, according to 3 Bl. Com. 293, is "only an amplification or exposition of the original writ upon which the action is founded, with the additional circumstances of time and place when and where the injury was committed." The particulars are to the declaration precisely what the declaration is to the writ.

TINDAL, C. J.—All the cases cited in which the applications have been unsuccessful, were cases where the amendment sought was the introduction of a new cause of action, or of a new count, after a lapse of time that could not but materially affect the interest of the defendant, and prejudice his defence. They cannot, however, govern this case, unless the amendment of the particulars of demand is to be put upon the same footing as an amendment of the declaration. The whole argument, indeed, on the part of the defendant, proceeded upon this footing. It appears to me, however, that the two cases stand upon

1838.

STAPLES v. HOLDSWORTH.

totally different grounds, and that the discretion of the court is to be governed differently in each. If a new count introducing a new cause of action were to be allowed after such a lapse of time that the statute of limitations would in the ordinary course be a bar, it would be taking away from the defendant a right the law has vested in him. But see the distinction between such a case and the present. The plaintiffs have brought their action, and the statute of limitations is a bar to all demands accruing more than six years before the suing out of the writ. If we were to yield to the argument that has been pressed upon us, we should in effect be saying that the statute of limitations is to be interpreted with reference, not to the commencement of the action, but to the bill of particulars. It seems to me, that, upon motions for leave to amend particulars, the court are in the exercise of their discretion to be governed solely by the reasonableness of the application. Many cases will readily suggest themselves, where the refusal to allow the amendment would be unjust. The defendant may himself have occasioned the difficulty; and is he to be at liberty to say that the plaintiff shall not be permitted to amend that which is made erroneous by his own mistake, or something worse? The ground of the application to amend in the present case is this. The plaintiffs framed their original particulars from an account furnished to them by the defendant. They have since discovered considerable mistakes in the mode of stating that account, and that large sums of money had been received by the defendant to their use of which no notice whatever is taken in the account. I see no reason why in justice and equity the plaintiffs should not be allowed to amend their particulars in this respect. The rule to rescind the order of my Brother Park (45) must be discharged.

(45) The order was issued by Mr. Justice Park; but the matter was argued and decided before Mr. Justice Vaughan.

1838.

STAPLES v. HOLDSWORTH.

PARK, J.—I am of the same opinion. These orders are constantly made at chambers; and, if erroneously, I must confess that I have been in error for three and twenty years.

VAUGHAN, J.—I am of the same opinion. This case has been argued upon a mistaken supposition that it is analogous to the case of an amendment of a declaration. It appears that the plaintiffs, finding themselves very much at the mercy of the defendant, were compelled to rely upon the account rendered to them by him; and accordingly their particulars were framed upon that account. They have since discovered that that account was not a true one, and that the particulars founded upon it will not suit the case they intend to set up. It would be gross injustice to withhold from them permission under such circumstances to amend. With respect to the delay, I think the defendant has no reason to complain: both parties have been conducive to it.

COLTMAN, J.—Generally speaking, it is pretty much a matter of course to allow particulars to be amended; though unreasonable delay would induce a judge to pause. In the present case it appears that the amendment was rendered necessary by the recent discovery by the plaintiffs of matters which the defendant should himself have disclosed to them—matters that ought to have appeared upon the account rendered by him. Under the circumstances, not to have allowed the amendment would have been productive of great injustice.

Rule discharged.

1838.

Friday, June 8th.

DOE *d.* MARTYNS *v.* ROE.

Service of declaration and notice in ejectment upon the Southampton Railway Company.

THIS was an action of ejectment brought against the Southampton Railway Company.

Channell moved for judgment against the casual ejector, upon an affidavit of service of the declaration and notice upon an officer in the employ of the company, at the London Station at Nine Elms. The 204th section of the statute 4 & 5 Will. 4, c. lxxxviii, the act incorporating the company, provides, "that, in all cases in which it may be necessary for any person or corporation to serve any summons or demand, or any notice, or any writ *or other proceeding* at law or in equity, upon the said company, personal service thereof upon the secretary of the said company, or leaving the same at the office of the said company either in London or Southampton, or delivering the same to some inmate at such office, or, in case the same shall not be found or known, then personal service thereof upon any agent of or officer employed by the said company, shall be deemed good and sufficient service of the same respectively on the said company."

TINDAL, C. J.—This is a "proceeding" within the meaning of the clause: the service therefore is sufficient.

Rule absolute.

1838.

ALEXANDER *v.* BONNIN.

Wednesday, June 13th.

THIS was an action of trespass for breaking and entering the plaintiff's close, and pulling down his wall. The trespass charged in the first count was alleged to have been committed in June, 1835; that charged in the second count, in March, 1836.

The defendant pleaded, to the whole declaration—first, not guilty—secondly, that the plaintiff was not possessed of the close in question: to the first count—thirdly, that the defendant was possessed of the close under certain articles of agreement of the 14th June, 1826, by which the plaintiff covenanted to demise to him the whole of the land described in the agreement—fourthly, leave and license under the above agreement to *erect and maintain* a brick wall upon the locus in quo: to the second count, other two pleas similar to the third and fourth. Issue was joined on the first and second pleas; and the replications to the other pleas put in issue the agreement and the leave and license.

The cause was tried before Tindal, C. J., at the sittings in Middlesex after Trinity Term, 1836, when a verdict was found for the plaintiff, damages 1*s.*, subject to the opinion of the court upon the following case:—

By indenture of lease, bearing date the 29th December, 1821, John Alexander, being seised in fee of a certain piece of nursery ground situate at Old Brompton, in

By articles of agreement between A. and B., the former covenanted, that, in consideration of the rents thereinafter covenanted to be paid, he would, when a certain fence and drains should have been completed, and any of the messuages thereinafter covenanted to be built should have been built and covered in, &c., by indentures of lease, *demise and lease unto B. or his nominee all such messuages respectively as should be so built* upon certain ground particularly described, and specified in a plan annexed to the agreement; with a reservation to A. of a right of way over the streets —habendum to B. for eighty years, on payment of certain annual sums for the first six years, and for the remaining seventy-four the yearly *rent* of 400*l.*: and B. covenanted, amongst other things, to erect a wall of certain dimensions along the west side of the land: and it was further agreed, that, until the whole of the messuages should be completed, and the agreement in all things fulfilled, two of the houses should remain unleased: with power to A. to re-enter upon any undemised part of the premises, for nonperformance of any of the before mentioned covenants. B. took possession under this agreement, and paid rent:—Held, that the legal interest in the soil passed to B.

A plea of leave and license to *erect and maintain* a wall upon a given spot, is not supported by proof of a license to *erect* only.

The third plea stated the agreement as a covenant to demise the whole of the land therein described:—Held, a fatal variance.

1838.

ALEXANDER v. BONNIN.

the parish of St. Mary Abbott, Kensington, in the county of Middlesex, demised the same to Samuel Harrison, nurseryman, for twenty-one years, with a proviso enabling the lessor, at any time during the said term, to resume possession of a part of the said ground adjoining the Fulham road, for the purpose of building thereon; in which case the lessor was to fence off at his own expense the part resumed, by building or causing to be built between it and the remainder of the ground a good and sufficient close fence of not less than six feet in height. Under that proviso, John Alexander, in 1826, resumed possession of part of the ground, and, with reference to such part, on the 14th June, 1826, certain articles of agreement under seal, and stamped with a 1*l.* 15*s.* stamp, made between the said John Alexander, of the one part, and the defendant, therein described as James Bonnin, of Brompton, Middlesex, builder, of the other part, were entered into and duly executed by the defendant and John Alexander; whereby John Alexander, for himself, his heirs and assigns, did covenant with the defendant, his executors, administrators, and assigns, that, in consideration of the rents thereinafter covenanted to be paid, he the said John Alexander, his heirs or assigns, should and would, when the boundary fence thereinafter particularly described, and the drains and cesspools, should have been completed, and any of the messuages or tenements thereinafter covenanted to be built should have been built and covered in, and the areas and cellars of the same formed and inclosed agreeably to the covenants thereinafter contained, by indentures of lease—such leases respectively not to comprise more than six of the said messuages or tenements, and to be prepared by the solicitor of the said John Alexander, his heirs or assigns, but at the expense of the said James Bonnin, his executors, administrators, or assigns—demise and lease unto the said James Bonnin, his executors, administrators, and assigns, or

Articles of agreement.

Covenant by John Alexander to grant leases.

1838.

ALEXANDER v. BONNIN.

unto such person or persons as he or they should nominate, all such messuages or tenements respectively as should be so erected and built, and covered in, upon all or any part of all that piece or parcel of ground belonging to him the said John Alexander, situate at Old Brompton; the same being bounded on the west by a nursery ground belonging to the said John Alexander, and then in the occupation of Samuel Harrison (of which piece or parcel of ground the locus in quo was parcel—all which piece or parcel of ground was also particularly specified in the plan or ground-plot thereof to the reciting agreement annexed—see post, p. 617), and all ways, watercourses, lights, easements, advantages, and appurtenances whatsoever to the said piece or parcel of ground, messuages or tenements, erections and buildings appertaining: saving and reserving to the said John Alexander, his heirs and assigns, and to his and their tenants, servants, and workmen, with or without horses, carts, and carriages, at all times during the term of years thereby agreed to be demised, a right of way through and over the three several streets marked F. in the plan to the said agreement annexed: to hold the said piece or parcel of ground and premises, with their appurtenances, unto the said James Bonnin, his executors, administrators, and assigns, from the 24th June then next ensuing, for the term of eighty years, yielding and paying therefore unto the said John Alexander, his heirs or assigns, for the first two years of the said term of eighty years, the annual sum of 50*l.*, for the third year the sum of 100*l.*, for the fourth year the sum of 150*l.*, for the fifth year the sum of 200*l.*, for the sixth year the sum of 300*l.*, and for all the remaining seventy-four years of the said term of eighty years the yearly rent of 400*l.*, payable quarterly, at the usual feasts in every year, clear of all deductions whatever.

Reservation of a right of way.

Habendum.

Reddendum.

And it was agreed, that, in each of the said leases, there should be contained (amongst other covenants) a covenant

Leases to contain a covenant for payment of rent, &c.

1838.

ALEXANDER v. BONNIN.

on the part of the lessees or lessee, their, his, or her executors, administrators, or assigns, for payment of the rent thereby made payable, and of all rates and taxes &c.; and also a covenant on the part of the lessees of the messuages facing the said Fulham road, and of the lessees of the messuages in the streets thereby agreed to be laid out, for contributing to the expense of the main sewer, and for making branch drains and branch sewers along the said streets; and a covenant on the part of the lessee or lessees to keep in good repair the said messuages, and at the end of the said term of eighty years to yield up the same to the said John Alexander, his heirs or assigns, together with all fixtures &c., and that the lessee or lessees of every such lease should pay their proportion of the expense incurred in respect of all party-walls, fences, sewers, &c., belonging or which should belong to the said premises; and that the rents to be reserved by such leases should continue payable to the said John Alexander, his heirs or assigns, notwithstanding any damage by fire; a covenant for restraining the lessees from exercising offensive trades, &c.; and a covenant for enabling John Alexander, his heirs and assigns, and his and their surveyors &c., twice in every year to enter on the said premises to ascertain the state of repairs thereof &c. And, amongst other provisos to be contained in such leases, was one that it should be lawful for John Alexander, his heirs and assigns, to use for the purposes of building all such party-walls of the messuages thereby agreed to be built as should abut on the ground of the said John Alexender, his heirs or assigns, on paying to the defendant, his executors, administrators, or assigns, a reasonable compensation, not exceeding a moiety of the expense of any party-wall so used. And the defendant did by the reciting agreement, for himself, his executors, administrators, and assigns, covenant with the said John Alexander, his heirs and assigns, that he, the defendant, his executors, administrators, or assigns, would accept such indentures of lease

Covenant to repair, &c.

Covenant by Bonnin to accept leases and to execute counterparts,

1838.

ALEXANDER v. BONNIN.

&c., and execute counterparts thereof, and pay the costs of preparing the same, and also of the reciting agreement and plan thereto annexed, &c., and (amongst other things) that he, the defendant, his executors, administrators, or assigns, should, within two years from the date of the said agreement, erect a good iron railing, to be approved of by the said surveyor of the said John Alexander, in front of the Terrace; and, within the space of three years, erect a good brick wall seven feet high along the west side of the said piece or parcel of ground; and should in the meantime erect and keep up a good and sufficient close fence along the west side of the piece or parcel of ground; and should, within five years, make sewers &c.; and should lay out the said piece or parcel of ground in forming the said terrace and streets according to a plan to be approved of by the surveyor of John Alexander; and also should, within eight years from the date of the reciting agreement, build as many messuages or tenements as were specified in the plan thereto annexed; and should finish in each year of the said eight years not less than eight of such messuages or tenements, all of which should be built according to the specification to the reciting agreement annexed; and also should pave the foot-ways and make good the carriage ways of the said streets &c. And it was further agreed by the parties to the now reciting agreement, that, in proportioning the ground-rents to be reserved by the said indentures of lease, no such ground-rent should exceed the sum of 10*l.* or be less than 2*l.* for each messuage or tenement thereby demised; but, in such proportionment, one eighth part at least of the said full rent of 400*l.* should be secured to the said John Alexander, his heirs or assigns, for each and every year ensuing the date of the now reciting agreement; and also that there should be at least two messuages or tenements unleased until the whole of such messuages or tenements should have been completed, and the stipulations in the reciting agreement, or in the plan

to erect an iron railing,

to erect a brick wall,

to build a given number of houses.

Apportionment of ground-rents.

1838.

ALEXANDER v. BONNIN.

and specification thereto annexed, contained, should have been fulfilled; and that the said James Bonnin, his executors, administrators, and assigns, should not remove, or dispose of, or use for making bricks, any surface-mould or earth from the ground thereby demised: And it was provided, that, if any of the said yearly rents thereinbefore reserved should be unpaid by the space of twenty-one days next after any of the appointed days of payment, or if the said James Bonnin, his executors, administrators, or assigns, should not perform the covenants and agreements thereinbefore expressed, according to the true intent and meaning of the now reciting agreement, then, in any of the said cases, it should be lawful for the said John Alexander, upon any undemised part or parts of the said premises to re-enter, and the same to re-possess and enjoy as of his former estate. And it was further agreed that the lessee of any of the said messuages or tenements should not be liable for more than the performance of his own respective covenants; nor should any covenant contained in the leases thereby to be granted, be construed to extend or apply to any thing further than the messuages or tenements, or messuage or tenement, in such leases respectively demised. And it was lastly agreed that the said John Alexander, his heirs or assigns, should, when required so to do by the said James Bonnin, his executors or administrators, deliver unto the said James Bonnin, his executors or administrators, a full and perfect abstract of his the said John Alexander's title to the said piece or parcel of ground; but that the said John Alexander should not deliver any abstract or give any evidence of title to any purchaser from the said James Bonnin, his executors, administrators, or assigns, or to any lessee of any of the messuages or tenements thereby agreed to be built.

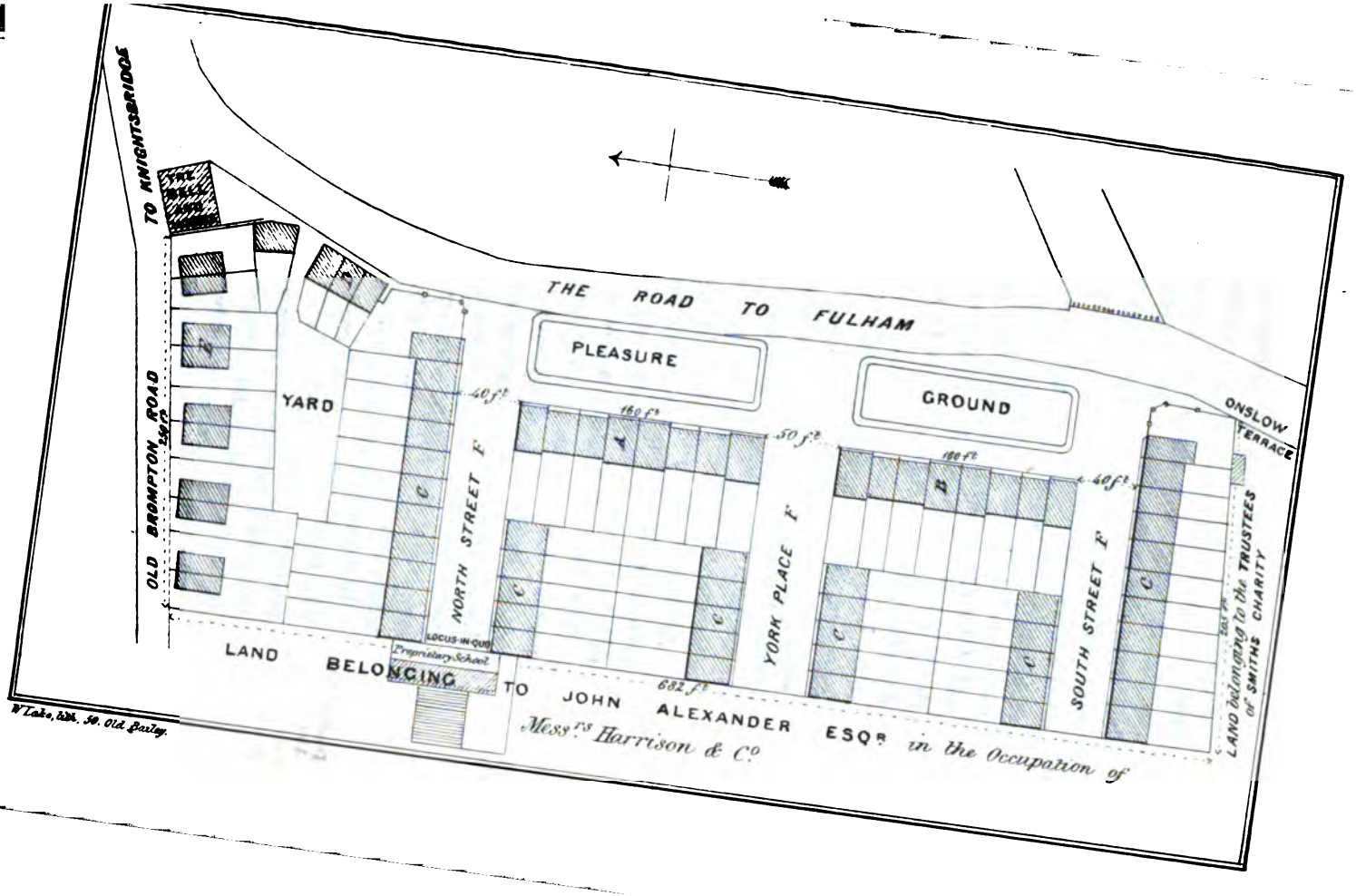
Proviso for re-entry.

No lessee liable except to the performance of his own covenants.

Abstract of title.

To the above-recited agreement the following ground plan was annexed, shewing the laying out of the ground and the proposed buildings thereon; and also a specification of the works to be done by the defendant:—

Ground plan.


TO KNIGHTSBRIDGE
OLD BROMPTON ROAD
THE ROAD TO FULHAM
PLEASURE GROUND
YARD
NORTH STREET
YORK PLACE
SOUTH STREET
ONSLOW TERRACE
40 ft
180 ft
50 ft
682 ft
LOCUS IN QUO
Proprietary School
LAND BELONGING TO JOHN ALEXANDER ESQR in the Occupation of
Messrs Harrison & Co
LAND belonging to the TRUSTEES of SMITHS CHARITY
W Lake, 45th. 59. Old Bailey.

1838.

ALEXANDER v. BONNIN.

The defendant entered on the ground in the articles of agreement mentioned, and built the messuages shewn in the plan in the recited agreement; and the same were built, and the sewers, drains, and roads, and all other things made and done (unless the court should consider what appears afterwards in this case not to be so) in pursuance of the said agreement; and the messuages, as they were from time to time completed, were demised by the said John Alexander in his life-time, and afterwards by the plaintiff (by distinct leases) to the nominees of the defendant, and in some instances to the defendant himself. In each lease was reserved a separate rent; and the aggregate of those rents made up the total amount to be secured, according to the said agreement, viz. 400*l.* a year. Each lessee was liable for his own rent and covenants only. The whole of the messuages were thus leased in pursuance of the said recited agreement.

All works done by the defendant under the articles of agreement upon the piece or parcel of ground comprised therein were completed previously to October, 1833.

The brick wall along the west side of the piece or parcel of ground was partly erected in the manner prescribed by the aforesaid indenture, and in lieu of the residue a dwarf wall with an iron railing was erected at the end of the three streets, under the express sanction and approval of the plaintiff's surveyor, and with the knowledge, privity, and approbation of the plaintiff.

Death of John Alexander.

In January, 1831, John Alexander died, and the plaintiff, as his only surviving son and heir at law, became possessed of his real estate, including the hereditaments comprised in the said recited agreement, and granted leases of the remaining messuages to the defendant, or his nominees, according to the said recited agreement.

Payment of rent.

The defendant by himself, and the lessees of the houses agreed to be built, paid the rent stipulated for in the agreement.

1838.

ALEXANDER v. BOSHER.

In the year 1832, in consequence of the bankruptcy of Harrison, the lease of the 29th December, 1821, was determined, and the remaining part of the nursery ground comprised therein came into the possession of the plaintiff.

Proprietary school erected.

A proprietary school was erected and finished near the locus in quo in the year 1836: it was wider than and forms the third side of North Street, being set back about forty feet beyond the dwarf wall and railing already mentioned (which was erected on the locus in quo, being part of the land mentioned in the articles of agreement) at the end of the street, the front looking up the street to the Fulham road.

Erection of the wall—the trespass complained of.

On the 25th May, 1835, the dwarf wall and railing on the west end of North Street were removed for the purpose of making the approach to the intended building for the proprietary school, which had then been just commenced. Afterwards, on the same day, the defendant with his workmen came and erected a close wooden fence across the street, on the site of the dwarf wall and railing which had been removed. About a fortnight afterwards the defendant caused the wooden fence to be taken down, and erected in its place a dwarf wall, with iron railings. On the completion of the building, the plaintiff, on the 10th March, 1836, had the dwarf wall and railing again removed; upon which the defendant caused a wooden fence to be put up where the dwarf wall and railing had been, viz. on part of the land mentioned in the articles of agreement: and on the 20th March, 1836, the defendant removed the wooden fence, and erected in its place a solid brick wall.

The above acts committed by the defendant were the trespasses complained of in the first and second counts of the declaration, upon which the present action was brought.

Question.

The question for the opinion of the court was, whether the plaintiff was entitled to recover; if so, the verdict was

1838.

ALEXANDER v. BONNIN.

to stand; but, if not, a verdict was to be entered for the defendant. In either case the verdict was to be entered on the respective issues, as the court might direct.

The case was argued in Easter Term last.

Ogle, for the plaintiff.—The question is whether or not the site of the wall for the erection of which this action is brought, passed to the defendant by the articles of agreement of June, 1826. That instrument operated merely as a covenant to demise; no present legal interest passed under it to the defendant. The plaintiff never could have intended to part with the possession and control over the property without reserving a rent; and he would be without remedy for the 400*l.* per annum rent, if the defendant failed to build the houses pursuant to his contract. The possession of the defendant under the agreement, and the payments made by him in the name of rent, were not under the circumstances sufficient to create the relation of landlord and tenant between the parties. No property could pass to the defendant until the leases stipulated to be granted should be executed: and then the right to the soil of the streets and the square, which were to remain unbuilt upon, must necessarily continue in Alexander.

W. H. Watson (*Atcherley*, Serjeant, was with him), for the defendant.—The action is clearly not maintainable. It is true that the agreement of June, 1826, contains no words of present demise; but the defendant has been let into possession, and has paid rent. Looking therefore at the intention of the parties, as evidenced by the agreement itself, and by their subsequent conduct in relation to it, it is clear that the legal interest did pass in all the land described in that agreement to the defendant. It is, however, perfectly immaterial for the purpose of the present argument, whether the legal interest passed or not: it

1838.

ALEXANDER v. BONNIN.

would be enough to contend that the defendant has under the agreement a right in equity to compel the plaintiff to grant him a lease for eighty years of all the ground not built upon. [*Tindal*, C. J.—Possibly a court of equity might compel the plaintiff to convey: but the sole question for us is, whether or not this instrument conveys the land to the defendant.] By the payment of rent a yearly tenancy was created: or, if necessary, it may be contended that at all events a tenancy at will was created, which has never been determined. In either view of the case, the plaintiff cannot sustain the action. The agreement is very inartificially drawn: but it is the language of the grantor; and "ambiguous words shall be taken most strong against the grantor, and most beneficial for the grantee"—Com. Dig. *Parols* (A. 4.)—citing Pl. Com. 10. b. So it is laid down (A. 7.), that "the general words in the premises of a deed or grant may be corrected, restrained, and explained by the habendum, or an exception; or by a condition annexed; or by the context or recital of the deed." In *Parkhurst* v. *Smith*, Willes, 332, Lord Chief Justice Willes says: "It is said in our books that the construction of deeds ought to be favourable, and as near to the apparent intent of the parties as possibly may be and as the law will permit. That too much regard is not to be had to the natural and proper signification of words and sentences to prevent the simple intention of the parties from taking effect; for that the law is not nice in grants, and therefore it doth often transpose words contrary to their order, to bring them to the intent of the parties. For, neither false Latin nor false English will make a deed void, if the intent of the parties doth plainly appear. I have collected these rules and maxims from Littleton, Plowden, Coke, Hobart, and Finch, persons of the greatest authority. But they are themselves so full of justice and good sense, that they do not want any authority to support them, and I do not know that they were ever yet

1838.

ALEXANDER v. BONNIN.

controverted." By this agreement Alexander reserves to himself a right of way over the streets in the plan marked F., assuming the soil to be another's; he also reserves to himself liberty to train trees against the party walls: these reservations would be wholly unnecessary if the ownership did not pass by the agreement to the defendant. The whole scope of the instrument—the proviso for re-entry—that two finished houses should always remain unleased until the whole should have been built (the object of which evidently was that there should be something substantial for the covenant for re-entry to operate upon—and the covenant to furnish an abstract of Alexander's title to the ground—coupled with the payment of rent, clearly shews the legal right to the land was intended to pass and did pass by the agreement.

Assuming that the possession of the land unbuilt upon, viz. the streets and the square or pleasure ground, remained in Alexander, the articles of agreement constitute a perpetual license to the defendant to erect and keep up a wall at the west end of the several streets.

Ogle, in reply.—Upon the third plea, at all events, the plaintiff is entitled to judgment: by that plea the defendant claims the legal estate under the agreement, but has not set it out truly; the plea alleges a covenant to demise the land, but makes no mention of the demise of the houses. That therefore is a fatal variance. The leave and license set up in the fourth plea is to *erect and maintain* a wall upon the locus in quo; whereas the license in the agreement is, if anything, a mere license to *erect*. The same objections apply to the fifth and sixth pleas.

As to the second plea, upon which the real question turns. It is perfectly clear that there are no words of demise to carry the legal estate. The agreement is certainly not free from ambiguity. The leases when granted, are to be granted by Alexander: if by the agreement the

1838.

ALEXANDER v. BONNIN.

legal estate were out of him, of what avail would be leases granted by him? It may be conceded that a receipt of rent eo nomine admits a tenancy from year to year: but that question is not raised by these pleadings; or, if it were, there is no evidence to support the case quoad that. If it had been intended to set up that the possession of the plaintiff was wrongful, the point should have been specifically raised by pleading.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court:

The verdict in this action of trespass will be found to depend on the inquiry whether, upon the facts stated in the case, the possession of the ground upon which the wall stood that was erected by the defendant, at the time of building such wall, did or did not belong to the plaintiff. If the legal possession of that piece of ground was vested in the plaintiff, he may maintain this action of trespass against the defendant for building a wall on his land: if, on the contrary, the plaintiff was not entitled to the possession, the verdict on the second plea, which forms an answer to the whole action, must be entered for the defendant. And this question will be raised between the parties upon the second plea, which contains a traverse of the plaintiff's possession; for, as to the third plea, which sets up a title to the piece of ground in the defendant himself, and justifies the committing of the alleged trespasses by reason of the defendant's possession under the articles of agreement of the 14th June, 1826, as there is a replication which puts the whole of this plea in issue, we think the plaintiff may avail himself of a fatal variance between the agreement as stated in the third plea, and the agreement itself as set out on the special case; the plea stating it to be a covenant to demise the whole of the land described in the agreement, whereas the agreement itself

As to the third plea—variance.

1838.

ALEXANDER v. BONNIN.

contains a covenant to demise the messuages only as they should be successively built upon the land. Upon the third plea, therefore, we think the plaintiff is entitled to the verdict.

As to the second plea.

Now, the second plea is pleaded to the whole of the declaration, and the finding of the issue raised on it will depend upon the construction to be put upon the articles of agreement of the 14th June, 1826. And we think, that, upon the proper construction to be put on those articles, and the acts done by the parties, the possession of the locus in quo at the time the trespasses were committed, *was not in the plaintiff*, and consequently that the defendant is entitled to the verdict on his second plea.

That the locus in quo formed part of the land comprised in that agreement, is expressly found as a fact in the special case. The only question, therefore, is, whether the defendant took the legal interest in that portion of the land, either under the agreement itself, or under any other contract to be implied from the entry of the defendant upon the land in question, and the payment of rent to the landlord.

Construction of the agreement of June 14, 1826.

Now, it would be difficult to maintain that the defendant took any direct interest under the instrument above referred to. Although the locus in quo forms part of the land comprised within that instrument and the plan to which it refers, there are no words whatever of any demise to the defendant of an interest in the whole of the land. The habendum, indeed comprehends the whole of the land for the term of eighty years; the reddendum makes the rent issuable out of the whole of the land for the first six years, or at least until the rent is apportioned upon the several messuages to be afterwards built; and from some words inserted in the saving or reservation, there may be ground to contend that there is a covenant or agreement to demise the whole. But there are not, in our opinion, any words of direct demise to pass the legal in-

1838.

ALEXANDER v. BONNIN.

terest in the whole to the defendant. And, as to the messuages which were intended to be built, and were in fact afterwards built, upon the land comprised within it, the instrument amounts to no more than a covenant on the part of the owner of the land to grant future leases of the several messuages as they should be successively built, either to the defendant himself or to his nominees, upon the terms specified in the instrument itself.

As to the legal possession of those portions of the ground that were not to be the subject of any future demise.

There was, however, a portion of the ground described in the agreement and plan over and above that upon which messuages were to be built. There was not only the piece of ground on which the wall in question was erected, but the ground intended to be formed into streets and pleasure grounds. And, as there was no covenant by the owner to grant future leases of these portions of ground, the question is in whom was the legal possession of these several portions of the ground vested under the instrument. And we think, after the entry made under that agreement by the defendant, and the payment of rent, the legal possession did not continue in the covenantor, but the same was vested in the defendant. With respect to the wall, the defendant enters into an express covenant within two years to build a wall seven feet high on the spot where the trespass was committed. This covenant, unless there is something in the instrument itself to rebut the inference, would lead to the conclusion that the possession of the land on which the wall stood was in the defendant. In the next place, the reservation of the right of way to the landlord over the three streets which were afterwards to be formed, affords, as it seems to us, an unanswerable argument that he had intended to part with the legal interest in the soil to the defendant. And the very covenant that the landlord should be at liberty to use the party-walls for building against them where they abutted upon his own ground, gives a sufficient indication

Reservation of right of way.

1838.

ALEXANDER v. BONNIN.

of intention on the part of both the contracting parties, that he might extend the length of the several streets which were laid out, but negatives any intention that he might by any building or fence across the end of the streets block them up.

Under this instrument, the defendant actually entered, took possession, and, before the messuages were built, paid rent: and we think, that, under these circumstances, he acquired the legal possession: and it is sufficient for the purpose of maintaining the second plea, if the defendant took under the instrument as tenant from year to year.

As to the fourth plea—leave and license.

The fourth plea is a special plea of leave and license under the agreement of the 14th June, 1826. But, as that plea states the agreement to contain a leave and license to the defendant *to erect and maintain* a brick wall upon the spot in question, whereas the agreement itself contains at most a license *to erect* a wall, and is altogether silent about maintaining it, we think this plea is not made out by the evidence, and that the plaintiff is entitled to the verdict thereon.

As to the fifth and sixth plea.

The same observations which have been made upon the third and fourth pleas, which are pleaded to the first count of the declaration, apply to the fifth and sixth pleas, which are pleaded to the second count; in respect of which latter pleas, the plaintiff, for the reasons before given, is entitled to the verdict.

Upon the whole, as the second plea goes to the whole action, and the defendant succeeds on that plea, he is in effect entitled to the judgment of the court.

Judgment for the defendant.

Gourry v Ravicoch
7 C. B. 310.

1838.

Wednesday, June 13th.

MAGRATH *v.* HARDY.

In assumpsit for money had and received, the defendant pleaded a recovery against him of the debt sued for, by foreign attachment in the Lord Mayor's Court, London, in which attachment one Tyrie was the plaintiff, the present plaintiff defendant, and the present defendant garnishee; the plea setting out the custom as to foreign attachment, the material part of which was, that, after pledges found by the plaintiff in foreign attachment, *and execution had and executed* of the monies in the hands of the garnishee, the latter was discharged as against the defendant of the sum so attached and had in execution—that the custom was confirmed by act of parliament—and, after setting out all the proceedings in the Mayor's Court, concluded with an averment that T. thereby had execution of the said sum, and then and there acknowledged himself satisfied, as by the record more fully appeared. The plaintiff replied, that he never had notice of the proceedings in the plea mentioned, that T. had not execution of the said sum according to the custom, that the monies of the now plaintiff in the hands of the now defendant were never had in execution as by the plea supposed, that no execution founded upon the said supposed judgment in the plea mentioned was ever executed, and that the now defendant paid the money, if ever it was paid, without compulsion and by connivance and collusion with T. The defendant thereupon joined issue.

At the trial it was proved that no writ or precept of execution was issued or executed in the cause, or served upon the defendant in the foreign attachment, or on the garnishee, the now defendant;—Held,

1. That the custom does not require that any notice of the proceedings in the Mayor's Court should be given to the defendant in the attachment.

2. That the allegation in the replication, that there was no execution had and executed pursuant to the custom, was a good answer to the plea, and, being proved, was a complete defence to the action.

3. That the partner of the attorney for the garnishee in the Mayor's Court was a competent witness to prove the custom, and the course of proceeding in the particular cause.

4. That the jury were not estopped by the record in the court below from finding according to the fact, the defendant having, by taking issue on the replication, waived any benefit he might otherwise have derived from the estoppel; for, that, where the estoppel appears upon the record (except in the special case of an estate in the land by estoppel), and the party who is entitled to take advantage of it, instead of relying upon it, goes to issue on the fact, he puts the matter at large, and the jury may disregard the estoppel.

THIS was an action for money had and received to the plaintiff's use, to which the defendant pleaded, fourthly, a recovery against him of the debt sued for, by foreign attachment in the Mayor's Court in London, in which attachment one Tyrie was the plaintiff, the present plaintiff was the defendant, and the present defendant was the garnishee.

The plea set out with particularity the custom of London with respect to foreign attachment, of which the part that was material to the present purpose was, that the custom was alleged to be, that, after pledges found by the plaintiff in foreign attachment, *and execution had and executed* of the monies in the hands of the garnishee, the garnishee was discharged against the defendant of the sum so attached and had in execution. The plea then stated the confimation of the custom by act of parliament, and set

1838.

MAGRATH v. HARDY.

out the proceedings in the usual form, and the judgment that Tyrie should have execution of 410*l.*, parcel of the sum attached, by pledges to restore the same if Magrath should appear within a year and a day and disprove the debt.

The plea then stated the issuing of a precept to the serjeant-at-mace for levying the amount, and the delivery thereof to him to be executed; that thereupon the serjeant-at-mace did take and receive from the now defendant the said sum of 410*l.* so attached as aforesaid, and without delay had the same in court to satisfy Tyrie; and that he paid and delivered the same to Tyrie. The plea then averred that Tyrie thereby had execution of the said sum, and then and there acknowledged himself satisfied, as by the record more fully appeared.

Replication.

To that plea the now plaintiff replied that he never had notice of the proceedings in the fourth plea mentioned; that Tyrie had not execution of the said sums according to the custom of the city; that the monies of the now plaintiff in the hands of the now defendant were never had in execution, as in the fourth plea might be supposed; that no execution founded upon the said supposed judgment in the said fourth plea mentioned, was ever executed; that the now defendant paid the said sum of 410*l.*, if ever it was paid, without compulsion, and by connivance and collusion with Tyrie—concluding to the country. Upon this replication issue was joined.

At the trial at the sittings in London after Michaelmas Term, 1836, a verdict was found for the plaintiff, with 1000*l.* damages, subject to the opinion of the court upon the following case:—

Special case.

The plaintiff was a merchant, who carried on his business and resided at Jacmel, St. Domingo, from 1824 to 1834 inclusive, and returned to England in the latter year. The defendant was also a merchant in London.

In the year 1827, the plaintiff, upon his own account,

1838.

MAGRATH v. HARDY.

remitted to the defendant a bill of exchange for 79*l.* 17*s.* 4*d.*, and also consigned a cargo of coffee for sale to the defendant.

This action was brought to recover the sum of 585*l.* 13*s.* 7*d.*, being the proceeds of the bill of exchange and the coffee, and interest thereon up to the 31st December, 1835.

Correspondence between the plaintiff and defendant.

It appeared by a correspondence between the plaintiff and defendant, that, in June, 1827, the plaintiff, being uncertain whether or not Tyrie, his usual agent, was in London, consigned to the defendant 180 bags of coffee, with directions to hold the proceeds to the plaintiff's order; also a bill of exchange for 79*l.* 17*s.* 4*d.*, which the defendant was also to hold to the plaintiff's order.

In October, 1827, the defendant apprised the plaintiff that the coffee had been sold, and the proceeds paid to Tyrie; but with the understanding that the defendant was to account to the plaintiff for the amount if he did not confirm the act, or if he drew on the defendant in the meantime.

In January, 1828, the plaintiff wrote to say he should dispose of these funds, either by drawing on the defendant, or requesting the proceeds to be paid to the plaintiff's order.

In April, 1828, the defendant wrote (in answer to a letter of the plaintiff's of February, 1828, containing a duplicate of the letter of January,) that, subsequently to the defendant's letter of October, 1827, Tyrie had lodged an attachment on the amount in the defendant's hands, but that it had not been followed by any ulterior proceedings.

In June, 1828, the plaintiff wrote to the defendant that he should look to him for the proceeds of the coffee, in virtue of his letter of October, 1827.

The plaintiff afterwards drew a bill on the defendant, dated Jacmel, the 30th April, 1830, for 412*l.* 0*s.* 10*d.*, payable at three days' sight to Messrs. Oldroyd, Magrath,

1838.

MAGRATH v. HARDY.

and Ward, who presented it for acceptance to the defendant on the 23rd June following, when the defendant declined to accept it.

The present action was commenced in January, 1836.

Action in the Mayor's court.

On the 31st January, 1828, an action was commenced by John Garnett Tyrie, the son in law of the defendant, against the plaintiff, in the Mayor's Court of London, founded upon an affidavit of debt for the sum of 500*l.* and upwards: proceedings by foreign attachment were adopted against the present defendant as garnishee, and such cause proceeded to judgment in the manner hereinafter stated; but no writs or precepts of execution were issued or executed in that cause or served upon the defendant in that cause, or the garnishee, the now defendant.

Ashley's evidence.

At the trial of the present cause, Ashley, one of the attorneys of the Lord Mayor's Court was called by the present plaintiff. He was the partner of Windale, the attorney for Hardy, the garnishee in the Mayor's Court, during the proceedings in *Tyrie* v. *Magrath:* and the defendant's counsel objected to his disclosure of any facts connected with that cause. The evidence was received, subject to the opinion of this court as to its admissibility. He stated the practice of that court in proceedings by foreign attachment, during his experience of twenty-five years, to have been according to the course hereinafter set forth:—

Practice of the Mayor's court.

A public book, called the Action Book, is kept in the Mayor's Court office, used by all the attornies. The first step with a view to obtain foreign attachment, is, that the plaintiff makes affidavit of debt, prepared by and sworn before the plaintiff's attorney in the cause; which affidavit afterwards remains in his possession. The plaintiff's attorney then makes an entry in the Action Book of the names of the parties, &c., thus:—

"In the Mayor's Court, London, 1828. January 21st, Henry Jason Magrath, defendant, at the suit of John

1838.

MAGRATH v. HARDY.

Garnett Tyrie, plaintiff, in a plea of debt upon demand of 1000*l.* lawful money of Great Britain. Sworn 500*l.* and upwards. ———— (attorney's name)—Pledges &c."

"Attachment thereon made in the hands of John Hardy the same day, between two and three afternoon by C. Sewell."

This book is kept in the Lord Mayor's Court, lying open in the office: but no one has the custody of it. A paper is next prepared by the plaintiff's attorney, directed to the garnishee, called an attachment paper. No precept or process is issued against the defendant, nor any actual default made, nor are there any returns of nihil or defaults or otherwise made to any process. The defendant is not actually called. The serjeant-at-mace serves the attachment on the garnishee; and then makes an entry in the Action Book that he has done so, and signs it. Upon the expiration of four clear days (neither of the days being a dies non) after service of the attachment, if no appearance is entered, a paper is prepared by the plaintiff's attorney, called a summons, directed to the garnishee. No entry is made of that summons, or of the service of it. The serjeant-at-mace delivers the original summons, but makes no entry of it, and communicates orally to the plaintiff's attorney the fact of service. When the garnishee appears, such appearance is made by his attorney marking in the Action Book that he appears for the garnishee, naming him: and these are the only entries in the book. A record is then made up by the plaintiff's attorney, stating the cause of action, that the plaintiff prayed process according to the custom &c., which was granted, that the serjeant-at-mace had summoned the defendant to answer the plaintiff, that the serjeant-at-mace at the same court returned according to the said custom that the defendant had nothing within the said city whereby he could summon him, nor was he found within the same, and that at the same court the defendant was solemnly called

1838.

MAGRATH v. HARDY.

and did not appear, but made default. Then it is alleged at the same court that the garnishee owes to the defendant 500*l.* process is thereupon prayed against him to attach the same, so that the defendant may appear &c., and then it is commanded to the serjeant-at-mace that he attach the said defendant by the said 500*l.*, so being in the hands of the garnishee, so that the defendant may appear &c. It is then stated by the record that the defendant was afterwards summoned to and solemnly called at four several subsequent courts, but did not appear, and made four defaults; and thereupon, after the said four defaults recorded by the court, process is prayed to warn the garnishee. The record is made up before the garnishee pleads, containing his appearance; and the record in that state is handed by the plaintiff's attorney to the registrar, who enters an imparlance. The parchment roll and the record is then handed to the garnishee's attorney by the registrar. A rule to plead is given orally by the plaintiff's attorney, and the registrar makes an entry of such rule upon the roll and in his own book. The record is then handed to the attorney of the garnishee; and, when the time for pleading is expired, the attorney for the plaintiff again demands the record; the attorney for the garnishee puts his plea on the record; the registrar then authenticates it by an entry on the record, and joins the issue upon it; but no other than the entries before stated are made of any of these proceedings. The record is handed by the registrar back to the plaintiff's attorney, and remains with him, and he inserts the cause in the list of causes for trial prepared by the registrar. If the cause be tried, the registrar marks the verdict, and no further entry of it is made. The postea is made up by the plaintiff's attorney, who retains the record afterwards in his own possession. An entry of judgment is made by the registrar forthwith upon the record, at the instance of the successful party, who is entitled to sign judgment on the day following that of the

trial. The plaintiff afterwards finds pledges; and it is the duty of his attorney to see that they are substantial. In *Tyrie* v. *Magrath* the pledges were substantial and responsible persons. A certificate of judgment is afterwards made out by the plaintiff's attorney, according to the following form:—

"Mr. John Hardy— I do hereby certify that judgment hath been entered against you in the Lord Mayor's Court, London, at the suit of John Garnett Tyrie, plaintiff, for the sum of 410*l.* heretofore attached in your hands as the proper monies of Henry Jason Magrath, defendant; and that security hath been given by the plaintiff in the said attachment for restitution of the said monies if his debt shall be disproved, according to the custom; as by the record of the said judgment now remaining in the said court appears.

"Dated the 22nd day of July, 1830.

"G. T. Reynal, plaintiff's attorney,

"Lord Mayor's Court office, Royal Exchange."

No entry is made of that certificate: it is usually served on the garnishee's attorney; and the plaintiff or his attorney, if the garnishee will pay, receives the money. If he refuses to pay, he may be taken into custody. When the money is paid, the practice is, to make an entry of satisfaction on the record; and that was done in *Tyrie* v. *Magrath*. The debtor may at any time come in and dissolve the attachment before satisfaction has been entered; but, when it is entered of record, he must come in within a year and a day afterwards.

It was further proved, that, until lately, writs of execution were rarely issued or executed; but that latterly it had been considered necessary; and such writs were accordingly issued and executed.

The proceedings in the cause of *Tyrie* v. *Magrath* were conducted throughout in conformity with the practice above set forth.

1838.

MAGRATH v. HARDY.

The present defendant called no witnesses, but gave in evidence an examined copy of a judgment in the cause of *Tyrie* v. *Magrath*.

Power to amend.

It was agreed that the court might exercise the same power and discretion of amending the record as the judge at Nisi Prius could under the 3 & 4 Will. 4, c. 42, s. 23; and that the court should be at liberty to draw the same conclusions as the jury might have done from the facts stated.

Question.

The question for the opinion of the court was, whether the plaintiff was entitled to recover; and, if so, the damages were to be 410*l*., with interest thereon from the 23rd June, 1830, till final judgment; but, if not, then a nonsuit was to be entered,

Wilde, Serjeant, for the plaintiff.—The replication must be taken to have been substantially proved; the jury having in effect found that execution was not executed in the foreign attachment: and the court will draw the same conclusion from the facts stated in the special case. The present plaintiff had no notice of the proceedings. No process actually issued; and the whole proceedings consisted in entries made in the book kept, in the manner described by the witness Ashley, in the Lord Mayor's Court office. Speaking of the practice of the Lord Mayor's Court, Dallas, C. J., in *Wetter* v. *Rucker*, 1 B. & B. 491, 4 Moore, 172, says: "Whatever may be the final decision of the court in point of law, one thing at least is perfectly clear, and that is, that this is a proceeding which ought to be strictly watched, and a custom which from its very nature, in order to protect the party, must be strictly pursued." There is no pretence for saying that Ashley, the partner of Hardy's attorney, was improperly examined as a witness for the purpose of proving the practice of the court, and that that practice had been followed in the present instance.

1838.

MAGRATH v. HARDY.

It will probably be contended, on the part of the defendant, that the plaintiff is estopped from disputing the truth of the record in the inferior court. If, however, the defendant had intended to rely on that objection, he should have rejoined the estoppel: upon the issue joined here, the jury were warranted in finding according to the truth—"If a party will not rely on an estoppel where he may, but takes issue on the fact, the jury will not be bound by the estoppel, for they are to find the truth of the fact. *Vooght* v. *Winch*, 2 B. & A. 662; *Trevivan* v. *Lawrence*, Salk. 276; Bul. N. P. 298. They cannot, indeed, find anything against that which the parties have affirmed and admitted on record, although such admission be contrary to the truth; but, in other cases, though the parties be estopped to say the truth, the jury are not, as in *Goddard's* case, Bul. N. P. 298, where, in an action upon a bond to a deceased intestate, the defendant pleaded the death of the intestate before the date of the bond, as alleged in the declaration, and so concluded that the writing was not his deed, on which issue was joined, and it was held that the jury were not estopped from finding that the bond was executed nine months before it bore date, and in the lifetime of the intestate"—Starkie on Evidence, part 2, p. 206. In *Paramore* v. *Pain*, Cro. Eliz. 598, to debt for 40*l.*, the defendant pleaded that the plaintiff was indebted unto him in 40*l.*, and he therefore sued a plaint in London, and there this debt in demand was attached in his hands; and he pleaded the foreign attachment in certain, and the judgment thereupon, &c. The plaintiff replied that he was not indebted to the defendant in 40*l.*, nor in any other sum: and it was thereupon demurred by Tanfield; for, the debt is not now traversable, because it is recovered in London, et non disrationatur within the year and day, as it might be by the custom. But Coke moved that the replication was good; for, whether he were indebted or not, is very well issuable; for, if he

1838.

MAGRATH v. HARDY.

were not indebted, they in London could not attach the plaintiff's debt by a foreign attachment for nothing. And so was the opinion of the whole court: and Fenner said, that, in the Common Bench, 22 & 23 Eliz., it was so ruled in one *Bray's* case. So, in *Palmer* v. *Hooke*, 1 Ld. Raym. 727, it was ruled by Holt, C. J., that, if the defendant, on an indebitatus assumpsit, gives in evidence a seizure of the debt under a foreign attachment, he must prove that the plaintiff was indebted at the time the attachment issued to the person who sued out the attachment.

Proof that execution was executed, was essential to the establishing of the plea. See 1 Wms. Saund. 67, n. (1), where the custom is set forth, and all the older authorities cited.

Bompas, Serjeant (*Bere* was with him), contrà.—The fourth plea sets out the custom, and avers that all the proceedings in the attachment were regularly gone through. All that the replication denies, is, the fact of execution having been executed.

Even if the replication in its present form were sufficient to put in issue the several steps in the foreign attachment, still the record of the proceedings in the Lord Mayor's Court is conclusive evidence of the facts stated in it. In Co. Litt. 117. b., it is said that "a record or inrolment is a memorial or monument of so high a nature as it importeth in itself such an absolute verity, as, if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself." Again, 260. a., Lord Coke says: "The rolls, being the records or memorials of the judges of the courts of record, import in them incontrolable credit and veritie, as they admit no averment, plea, or proof to the contrary. And, if such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself:

1838.

MAGRATH v. HARDY.

and the reason hereof is apparent, for, otherwise (as our old authors say, and that truly,) there should never be any end of controversies, which should be inconvenient. During the term wherein any judicial act is done, the record remaineth in the breast of the judges of the court, and in their remembrance, and therefore the roll is alterable during that term, as the judges shall direct, but, when that term is past, then the record is in the roll, and admitteth no alteration, averment, or proof to the contrary." And see *Mackalley's* Case, 9 Rep. 65. a. [*Tindal*, C. J.—Though the parties be estopped, the jury are not. The plaintiff might have replied the estoppel, and thus have brought it before the court. *Park*, J.—In *Goddard's* Case, 2 Rep. 4, it was held, that, a party to a deed cannot aver that it was delivered before the day on which it bears date, yet the jury are not estopped to say the truth.] This is not mere matter of estoppel as between the parties: the record is conclusive evidence as against all the world that the facts therein stated did take place. In *Reed* v. *Jackson*, 1 East, 355, it was held that a verdict against one defendant in trespass upon an issue of a justification of a public right of way, is evidence in trespass for breaking and entering the same close against another defendant who justified under the same right; and the latter cannot shew that such verdict was entered upon that particular plea by mistake of the officer, there having been no evidence given on either side in respect of that issue on the former trial; *the record being conclusive as to the fact of such a finding, though not as to the truth of it between the parties.* In *Ramsbottom* v. *Buckhurst*, 2 M. & S. 567, Lord Ellenborough says: "The judgment roll imports incontrovertible verity as to all the proceedings which it sets forth; and so much so that a party cannot be admitted to plead that the things which it professes to state are not true. Would it be competent to aver that there was no such declaration, or plea, or trial, or that

1838.

MAGRATH v. HARDY.

the court did not pronounce such judgment as stated in the record? I apprehend it would not; and therefore every part of the record, as long as it remains on the files of the court, must be taken to speak absolute verity." In *Rex* v. *Hopper*, 3 Price, 495, it was held, with reference to a deed of bargain and sale inrolled, that the indorsement of the clerk of the inrolments is a part of the record, and cannot be averred against. *Dudley* v. *Watchorn*, 16 East, 39, will probably be relied on on the other side, as shewing that the practice of the court is pleadable where the very merits of the case depend upon it: but neither that case, nor *Vooght* v. *Winch*, or *Hooper* v. *Hooper*, M'Clel. & Y. 509, affords any authority for saying that the conclusiveness of the record of proceedings in a court of competent jurisdiction can be questioned. *Huxham* v. *Smith*, 2 Camp. 19, is exactly in point, and, if it be law, must decide this case. It was there held, that, to prove that the defendant under process of foreign attachment, has paid a sum of money to a creditor of the plaintiff, the record of the cause in the Mayor's Court, with an entry of satisfaction, is conclusive evidence. And Lord Ellenborough said: "If the money was attached in the defendant's hands, and he paid it pursuant to the judgment of a court of competent jurisdiction, I must suppose omnia rite acta. Sitting at Nisi Prius, can I unravel the proceedings before the Recorder of London, and grant a new trial in the cause which he has decided. I must give credit to the record which is produced." A probate is conclusive evidence of the will. [*Tindal*, C. J.—The grant of a probate is the act of a court of exclusive jurisdiction over the subject-matter, and the proceeding is ad rem.] In the case of a conviction by a justice of the peace, a party is not permitted to deny the fact of the conviction having taken place. In *M'Daniel* v. *Hughes*, 3 East, 367, it was held that a garnishee against whom a recovery was had in the Mayor's Court in foreign attachment, after a

1838.

MAGRATH v. HARDY.

summons to the defendant and nihil returned, may protect himself by giving such proceedings in evidence upon non assumpsit, in an action to recover the same debt brought by the defendant below, without proving the debt of the plaintiff below who attached the money in his hands. In *Wetter* v. *Rucker*, upon which much reliance is placed on the other side, there was no entry of satisfaction upon the record, and the defendant below came in within a year and a day, and dissolved the attachment.

Payment compulsory and bonâ fide.

There is no pretence for saying that the proceedings in the inferior court were not in every respect perfectly regular, or that the payment was not compulsory and bonâ fide. In *Hills* v. *Street*, 5 Bing. 37, 2 M. & P. 96, a broker having seized goods under a distress for rent, the tenant desired time, and that the broker would not remove or sell; on which the latter required the tenant to sign written requests from time to time, by which he also engaged to pay the charges of the levy, and the expenses of keeping a man in possession. The goods were not removed, and the broker applied for and obtained those charges, but the tenant objected to the amount, as well as to the sum alleged to be due for rent: and it was held that the payment by the tenant was not a voluntary payment, and that, if the charges were illegal or excessive, he might recover them back in an action for money had and received. So, in *Carter* v. *Carter*, 5 Bing. 406, 2 M. & P. 732, it was held that a payment of ground-rent by the occupier, in default of the mesne tenant, is not the less a compulsory payment because the ground landlord on demanding it allows the occupier time to pay. [*Tindal*, C. J.—Is it not consistent that the payment of this money was voluntary, and the proceedings in the Mayor's Court a mere shew to fortify the defendant against the consequences?] That there was a subsisting debt as between Hardy and Magrath at the time of the attachment, is clear. It is perfectly competent to a man to attach a debt in his own hands—

1838.

MAGRATH v. HARDY.

Paramore v. *Pain*, Cro. Eliz. 598; and there is nothing fraudulent in a party giving notice to a creditor that there is a debt in his hands that may be attached.

As to the competency of Ashley.

Ashley was not a competent witness to prove, contrary to the averment on the record, that no process had issued. To permit an attorney to come and say that he has omitted to take a necessary step in a cause, would be to allow him to betray his client. An attorney is never permitted to divulge any thing that comes to his knowledge in his character of professional adviser. [*Coltman*, J.—The rule is confined to matters that are communicated by the client: here the party was called to speak to the practice of the court of which he was an officer: surely he was a competent witness for that purpose.]

Wilde, Serjeant, in reply.—The facts disclosed in this case, shew that a gross and palpable fraud has been committed upon the plaintiff. The main question is whether or not this money was paid by the defendant to Tyrie under the compulsory process of the Lord Mayor's Court. To make out the affirmative, it was necessary to shew that execution was had and executed—*Wetter* v. *Rucker*. Was the payment in this case made in consequence and under pressure of an execution duly issued and executed according to the custom of the court? It appears that the record is made up by the plaintiff's attorney, and is not authenticated by the court; and that no summons or precept issues, nor is any return of nihil made; but that these several steps are entered of record without any regard to the fact. A record is ex vi termini a document kept by the court. In the Lord Mayor's Court, it appears that the book in which the proceedings are recorded, is not kept by any one officer; but that the entries are made *by the attorney for the plaintiff in the cause*. What reliance can be placed upon a document so kept? Ashley was called, not to prove what was his own duty; but for the purpose of

1838.

MAGRATH v. HARDY.

shewing, as his situation in the court enabled him to do, that no such process as that alleged was or could be by the practice of the court issued by his opponent's attorney. To operate an estoppel, a record must be pleaded—*Outram* v. *Morewood*, 3 East, 346; otherwise it is not conclusive, but only evidence to go to the jury—*Vooght* v. *Winch*, 2 B. & A. 662. *Basten* v. *Carew*, 5 D. & R. 558, 3 B. & C. 649, and *Hooper* v. *Hooper*, M'Clel. & Y. 509, are authorities to the same effect. In *Doe* v. *Huddart*, 2 C. M. & R. 316, it was held that a judgment in ejectment is not conclusive evidence of title in the action for mesne profits, unless it be pleaded by way of estoppel. Bolland, B., in delivering the judgment of the court, there says: "The general rule of law, since the case of *Vooght* v. *Winch*, must, we think, be taken to be clearly established; and that is, that a judgment between the same parties is not conclusive, unless pleaded as an estoppel. There are two modes, as Mr. Justice Holroyd there observes, which a party may adopt: he may say the other party is not at liberty to call upon me to answer for what has been previously decided; or he may say that his opponent has no such ground of action as he has alleged. In the latter case, he refers the question to the jury, who are to determine, not whether it has been previously so decided, but whether the right be as alleged in the pleadings of the parties. And in *Goddard's* Case, 2 Rep. 4. b., it is laid down, that, although in pleading the obligee cannot allege delivery before the date, because he is estopped from taking an averment against any thing expressed in the deed, yet the *jurors*, who are sworn to say the truth, shall not be estopped." If the defendant had intended to rely on the alleged estoppel in the plea, he might have demurred to the replication; or, if the matter of estoppel did not sufficiently appear upon the plea, it might have been rejoined. But, where a party chooses to take issue on the fact, he thereby waives the estoppel. The jurisdiction in question extends to debts only, and not

Law of estoppel.

1838.

MAGRATH v. HARDY.

to a possibility or expectation of a debt. Here, the payment by the defendant to Tyrie was clearly collusive and voluntary, and not made in consequence of the attachment.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.

This was an action for money had and received to the plaintiff's use, to which the defendant pleaded, fourthly, a recovery against him of the debt sued for by foreign attachment in the Mayor's Court in London; in which attachment one Tyrie was the plaintiff, the present plaintiff was the defendant, and the present defendant was the garnishee.

The plea set out with particularity the custom of London with respect to foreign attachment, of which the part that is material to the present purpose, is, that the custom is alleged to be, that, after pledges found by the plaintiff in foreign attachment, and execution had and executed of the monies in the hands of the garnishee, the garnishee is discharged against the defendant of the sum so attached and had in execution. The plea then stated the confirmation of the custom by act of parliament, and set out the proceedings in the usual form, and the judgment that Tyrie should have execution of 410*l.*, parcel of the sum attached, by pledges to restore the same if the plaintiff should appear within a year and a day, and disprove the debt. The plea then stated the issuing of a precept to the serjeant-at-mace for levying the amount, and the delivery thereof to him to be executed, and that thereupon the serjeant-at-mace did take and receive from the now defendant the said sum of 410*l.* so attached as aforesaid, and without delay had the same in court to satisfy Tyrie, and that he paid and delivered the same to Tyrie. The plea then avers that Tyrie thereby had execution of the said sum, and then and there acknowledged himself satisfied, as by the record &c. more fully appeared.

To this plea the now plaintiff replied that he never had notice of the proceedings in the fourth plea mentioned; that Tyrie had not execution executed of the said sums according to the custom of the city; that the monies of the plaintiff in the hands of the defendant were never had in execution as by the fourth plea might be supposed; that no execution founded upon the said supposed judgment in the said fourth plea mentioned was ever executed; and that the now defendant paid the said sum of 410*l.*, if ever it was paid, without compulsion, and by connivance and collusion with the said Tyrie: and this he prayed might be inquired of by the country.

The defendant thereupon joined issue.

Upon the facts proved in this case, three questions arise —first, whether the material allegations of the replication were proved in point of fact—secondly, whether, by any technical rule of law, the plaintiff was precluded from proving, and the jury from finding, the truth of the case—thirdly, whether the facts stated in the replication afford a sufficient answer to the plea.

It will be most convenient to consider first in order the last of these three questions.

Third point. The replication a good answer to the plea.

The first allegation of the replication is, that the plaintiff had no notice of the proceedings in the foreign attachment. This allegation does not furnish any ground of answer to the plea; for, the custom of the city as set out in the plea is admitted in the replication, and has been confirmed in parliament, and the custom does not require that any notice should be given to the defendant in the attachment of the proceedings in the Mayor's Court. That allegation, therefore, appears to us to be immaterial and idle.

Allegation as to want of notice.

That no execution was executed.

The next allegation is, that there was no execution executed. This allegation is three times repeated, with some slight variation in terms; but the whole amounts to an allegation that there was no execution executed pur-

1838.

MAGRATH v. HARDY.

suant to the custom. It scarcely requires an authority to shew that this allegation contains in substance a good answer to the plea; for, the plea being only good by the custom, it follows, that, unless the custom is pursued, the defendant must fail in his defence. Now, the custom is alleged in the plea to be, that, after execution had and executed, the garnishee shall be discharged as against the defendant below. The allegation in the replication shews therefore that the custom has not been complied with. If an authority were required on this point, the case of *Wetter* v. *Rucker*, 1 B. & B. 491, 4 Moore, 172, and the other cases there cited, are in point to shew, that, under such circumstances, the defendant is not discharged.

As to the alleged fraud.

The replication contains, further, a statement that the money paid was paid without compulsion, and by connivance and collusion. It is not very clear what precise legal ground of defence is here meant to be relied on; nor is it essential to inquire; as, for the reasons already assigned, we think the replication contains a sufficient answer to the plea.

First point.—Material allegations of the replication proved in point of fact.

The next question for consideration is, whether the material allegations of the replication were proved in point of fact. The only allegation which it was essential for the plaintiff to prove, was, that there was no execution executed according to the custom; for, by the ordinary rule of pleading, a party is only bound to prove the substance of the matter pleaded, that is to say, so much of a plea or replication as constitutes a complete and valid answer to the matter alleged in the adverse pleading which it professes to answer. Now, it is expressly found in the case, that no writs or precepts of execution were issued or executed in the cause, or served upon the defendants in that cause, or on the garnishee, the now defendant. The replication therefore must be considered as proved in point of fact.

As to the competency of Ashley.

And this seems to be a convenient place for noticing an

objection which was made on the defendant's behalf to the examination by the plaintiff of Mr. Ashley. Mr. Ashley was at the time of his examination the partner of Mr. Windale, who had been the attorney for Mr. Hardy in the foreign attachment. The counsel for the defendant objected on that ground to his disclosing any facts connected with the cause. But we think this objection is far too wide. The party objected to was not the attorney in the cause; and, if he had been, an attorney may know many facts connected with the cause which he has not learned from his client or in the course of the cause. And there is nothing to shew that Mr. Ashley was examined in the present instance to any facts which came to his knowledge under the seal of professional confidence.

Second point.—As to the alleged estoppel.

It remains only to consider the second question, which is, whether the plaintiff was precluded from proving, and the jury from finding, the truth of the case, by any technical rule of law. It was strongly insisted in argument on the defendant's behalf, that the record in the foreign attachment was conclusive, and that not only the plaintiff, but the jury also, were concluded by it; and the cases of *Reed* v. *Jackson*, 1 East, 355, *The King* v. *Hopper*, 3 Price, 495, and *Huxham* v. *Smith*, 2 Camp. 19, were relied on: and the cases were referred to in which convictions before magistrates have been said to be conclusive of the facts stated in them; and it was asked whether a probate could be controverted in evidence; and it was insisted that in no case could the facts stated in a record be disputed; and the judgment of Lord Ellenborough in *Ramsbottom* v. *Buckhurst*, 2 M. & S. 567, was cited in support of the proposition contended for in its fullest extent.

It is undoubtedly true, as a general rule, that no man can take any averment contradictory to a record. Our law books are full of cases in which this doctrine is stated or distinctly implied: see Plowden, 491; *Johnson* v. *Smith*, 2 Burr. 950; *Bailey* v. *Bunning*, Sid. 271, 1 Levinz, 173, 2 Keble, 32, 33:

1838.

MAGRATH v. HARDY.

Rex v. *Mann*, Str. 749; *Hinde's* Case, 4 Rep. 71, 2 Leo. 121, Owen 138, and the cases cited above. But, although it is true that no one can be allowed to aver against a record; and that, not only parties and privies, but even strangers also, are estopped to aver anything to the contrary; it is a different question whether this estoppel will bind the jury from finding the truth of the fact, where the estoppel is not pleaded and relied on. A jury may, indeed, it is said, find matter of estoppel, though it is not pleaded and relied on, and, when it is found, the court shall judge according to law—Com. Dig., *Pleader*, (S. 4). And therefore, if a man makes a lease by indenture to A. of his own land, whereby A. is estopped to say it was not demised, the jury may find such matter, though it be not pleaded—Com. Dig. qua supra. And in *Pleadal's* Case, cited in *Rawlins's* Case, 4 Rep. 53, and in Cro. Eliz. 36, 37, which was an ejectment to which the general issue had been pleaded, because the jury did not find a deed indented, which took its operation only by conclusion, they were attainted, and judgment accordingly; the reason of which case may perhaps be collected from what is said in *Treviban* v. *Lawrence*, 2 Lord Raym. 1051, that, where an estoppel is of such a nature that it creates an interest and works upon the estate of the land, the jury are estopped. But, however the case may be in the special case of an estate in the land by estoppel, and where the question arises upon the general issue, there are not wanting cases to shew that in general an estoppel does not bind the jury; and more particularly, that, if the estoppel appears upon the record, and the party who is entitled to take advantage of it, instead of relying upon it, goes to issue on the fact, he puts the matter at large, and the jury may disregard the estoppel.

Thus, in *Goddard's* Case, 2 Rep. 4, which was debt on bond, the reason of the judgment was said to be, that, although the obligee was estopped to take an averment against anything expressed in the deed, yet the jurors,

1838.

MAGRATH v. HARDY.

who are sworn to say the truth, shall not be estopped, for, an estoppel is to conclude one to say the truth, and therefore jurors cannot be estopped, because they are sworn to say the truth. So, in the case of *Speak* v. *Richards*, Hob. 206, which was an action of debt for 523*l.* 17*s.* against Richards, sheriff of Southampton, on his return to a levari facias that he had levied the said monies, which he had ready, the defendant, quoad 308*l.*, pleaded nil debet, whereupon the plaintiff took issue; and, as to the rest, pleaded payment and an acquittance, whereupon the plaintiff demurred. One point urged for the plaintiff, was, that the plea of nil debet was naught, being directly contrary to the return of record: but it was answered, that, since they had not relied on the estoppel, but taken issue, that could give no advantage.

The law on this point is laid down with great distinctness in the case of *Treviban* v. *Lawrence*, 2 Ld. Raym. 1048, 1 Salk. 276: "The court," it is said, "took this difference, that, where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel; for, here is a title in the plaintiff that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but, if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for then they are to find the truth of the fact, which is against him. Thus, in debt for rent on an indenture of lease, if the defendant plead nil debet, he cannot give in evidence that the plaintiff had nothing in the tenements, because, if he had pleaded that specially, the plaintiff might have replied the indenture, and estopped him: but, if the defendant plead nihil habuit &c., and the plaintiff will not rely on the estoppel, but reply habuit &c., he waives the estoppel, and leaves it at large, and the jury shall find the truth, notwithstanding the indenture."

1838.

MAGRATH v. HARDY.

These cases, we think, furnish a sufficient ground for holding in the present case that the defendant, by taking issue on the replication, has waived any benefit he might have derived from the estoppel, and has left the matter at large, to be decided according to the truth and justice of the case.

Our decision, standing on the ground above explained, does not clash with the cases cited on behalf of the defendant, being distinguishable therefrom on the ground that the defendant has by his own act expressly and in terms waived the benefit of the estoppel, and referred the truth of the fact to the consideration of the jury.

Upon the whole, therefore, we think that the issue raised on the fourth plea must be considered as having been found for the plaintiff, and consequently that he will be entitled to judgment in his favor.

Judgment for the plaintiff.

Monday, June 4th.

The court set aside a particular of set-off which the defendant was attempting to avail himself of in contravention of an express understanding between the parties as to the real question to be tried.

GOULD and Others *v.* OLIVER.

CASE for unskilfully loading timber on the deck of the defendant's ship, bound from Quebec to London, whereby the timber was lost. In the second count the plaintiffs claimed a general average by custom in respect of the loss of the timber by jettison. The defendant in his first plea traversed the misconduct and unskilfulness charged in the first count, and in the second traversed the custom therein alleged. There was also a plea of set-off for general average payable by the plaintiffs in respect of other goods on board the vessel. The plaintiffs demurred to the second plea, and joined issue on the others. The trial of the issues in fact, as also an order obtained by the plaintiff for particulars of the alleged set-off, were *by consent* suspended until the judgment of the court should be pronounced on the demurrer.

1838.

GOULD v. OLIVER.

The plaintiffs obtained judgment on the demurrer in Michaelmas Term, 1837—vide ante, Vol. 5, 445. On the 16th January, 1838, the defendant delivered a particular of set-off, claiming in respect of the general average above mentioned, 22*l.* 19*s.* 9*d.* On the 24th, the plaintiffs obtained a rule for a special jury. On the 10th February, the particular of set-off was returned to the defendant's attorney. The cause had been set down for trial at the sittings after Hilary Term, but was made a remanet.

Wilde, Serjeant, in Easter Term last, upon an affidavit alleging an understanding between the parties that the real question to be tried was as to the right to load deck cargo in the particular trade, and suggesting that the particular of set-off had been delivered improperly, with a view to the evasion of that agreement, obtained a rule nisi to set it aside, on payment of the amount claimed therein.

Atcherley, Serjeant, and *R. V. Richards*, in opposition to the rule, submitted that the alleged understanding ought not to be allowed to operate so as to vary the right of the defendant to avail himself of his plea of set-off.

Wilde, Serjeant, was heard in support of his rule.

PER CURIAM.—The parties having agreed that a particular question shall be tried between them, it would be unjust to the plaintiffs to allow the defendant to obtain an advantage which it evidently was the intention of both that he should not have.

Rule absolute.

1838.

HINCHLIFFE v. The Earl of KINNOUL.

near to the Eastern side of the said messuage of the plaintiff, and which said coal-shoot or coal-hole passed in an oblique direction into a coal-cellar belonging to the said messuage and forming part thereof—That, during all the time of the plaintiff's possession as aforesaid, and for many years antecedent thereto, there was a pipe for carrying water necessary for the convenient and beneficial use and occupation of the said messuage, and which was the sole pipe for the supply of water to the said premises, situate in the soil under the said passage; and also another pipe for conveying water and soil from a water-closet, part and parcel of the said messuage, for the necessary occupation of the same; which last-mentioned pipe, and also part of the first-mentioned pipe, passed outside the Eastern wall of the said messuage so abutting on the said passage as aforesaid—That the coal-shoot in the declaration mentioned was during all the time aforesaid necessary for the convenient use and occupation of the said messuage and premises, with the appurtenances—That the said coal-shoot could not be used without passing and re-passing along the said passage—That the necessary repairs to the said pipes and side or wall of the messuage abutting upon the said passage, could not be done without passing and re-passing along the said passage—That, at the said several times when &c., the plaintiff had occasion to use the coal-shoot and to repair the pipes and side or wall; that the defendant hindered and obstructed the plaintiff at the said several times when &c. from passing and re-passing along the said passage for the purpose of using the coal-shoot, and for the purpose of repairing the said pipes and side or wall.

Original ground lease—Oct. 2, 1728—to Barlow and Andrews—expired Lady-Day, 1824.

That, by indenture of lease of the 2nd October, 1728, Sir Robert Myddleton, as committee of Dame Mary Grosvenor, widow, a lunatic, demised to Thomas Barlow and Robert Andrews part of a field called Upper Hill Field, in the parish of St. George, Hanover Square, fronting towards the East one hundred and twenty feet on Audley

1838.

HINCHLIFFE v. The Earl of KINNOUL.

Street, towards the North four hundred and forty feet on an intended street to be called Green Street, and towards the West two hundred and ten feet on another new street to be called Hyde Park Street, and abutting on the South partly on buildings leased to John Brown and partly on an intended stable yard or mews; together with all ways, passages, lights, easements, &c. (which parcel of ground was part of a large piece of ground agreed to be let to Barlow and Andrews by the said Sir Robert Myddleton): to hold the said piece of ground and premises, from Lady-Day, 1727, unto the full end and term of ninety-seven years thence next ensuing, at a yearly rent of 4*s.*

July 22, 1729—demise from Barlow and Andrews to Gray and Brown.

That, by indenture of lease of the 22nd July, 1729, Barlow and Andrews demised to Gray and Brown a part of Upper Hill Field, fronting towards the South sixty-five feet on the said intended stable-yard or mews, towards the East seventy-five feet on land in the occupation of Roger Morris, then towards the North fifty feet on land in the occupation of James Richards, then towards the East seventy-five feet on the same land, then towards the North five feet on Green Street, then towards the West seventy-five feet on land in the occupation of Robert Umpleby, then towards the North ten feet on the same land, and then towards the West 75 feet on land in the occupation of Richard Oakman; with free ingress, egress, and re-gress, along with other tenants, over the intended stable-yard or mews: to hold from Lady-Day then last past for 93 years thence next ensuing, at the rent of 10*l.*

That the part of the last-mentioned premises described as fronting five feet on Green Street, and seventy-five feet East and West on land in the occupation of Richards and Umpleby respectively, was the soil of the way or passage in the declaration mentioned; and that the premises in the occupation of Umpleby were the premises of the plaintiff in the declaration mentioned.

July 17, 1730—demise by Barlow and

That, by indenture of lease of the 17th July, 1730, Barlow and Andrews demised to Robert Umpleby part of

1838.

HINCHLIFFE v. The Earl of KINNOUL.

Andrews to Umpleby.

Upper Hill field fronting towards the West seventy-five feet on land let by Barlow and Andrews to Thomas Parker, carpenter, towards the North fifty feet on Green Street, towards the East seventy-five feet on land in the occupation of Gray and Brown (being the way or passage before described), and towards the South partly on land in the occupation of Gray and Brown, and partly on land in the occupation of Oakman: to hold from Lady-Day then last past for ninety-two years, at a rent of 10*l.* per annum.

Umpleby's interest came by assignment to Grace, who on Feb. 27, 1764, granted a term, which ultimately vested in Mrs. Hinchliffe, the plaintiff's mother.

That Umpleby's interest became vested by assignment in Thomas Grace; that, by indenture of lease of the 27th February, 1764, Grace demised the premises, together with a messuage then built thereon, and all vaults, cellars, ways, paths, passages, and appurtenances, to Samuel Adams, to hold from Michaelmas, 1761, for sixty years and a half next ensuing, wanting seven days, at a rent of 10*l.* per annum; that Adams's interest vested in Mary Forrester, widow; and that, by indenture of the 29th June, 1799, the executors of Mary Forrester demised the messuage and premises, with the yard or garden and appurtenances thereunto belonging, or usually occupied or enjoyed therewith, as the same were in the occupation of Mrs. Forrester, to Elizabeth Hinchliffe, the mother of the plaintiff, to hold from Midsummer-Day then last past, for 21 years.

Reversion in fee of the premises demised in Oct. 1728, vested in Lord Grosvenor.

That, before and on the 20th July, 1819, the reversion in fee of the premises demised by the indenture of the 2nd October, 1728, was vested in Robert, Earl Grosvenor.

July 20, 1819—Lord Grosvenor demised to Mrs. Hinchliffe for 57½ years from Lady-Day, 1824.

That, by indenture of the 20th July, 1819, the said Earl, in consideration of 1867*l.* 16*s.*, demised to Elizabeth Hinchliffe and the plaintiff the piece of ground, and the messuage thereon, fronting towards the North twenty-seven feet on Green Street, and towards the East seventy-five feet on the way or passage in the declaration mentioned, leading from Green Street into Lee's Mews; together with all the appurtenances to the said piece or parcel of ground, messuage or tenement, erections, buildings, and premises belonging or in any wise appertaining;

1838.

HINCHLIFFE v. The Earl of KINNOUL.

to hold the premises, with the appurtenances, from Lady-Day, 1824, at which time the indenture of the 2nd October, 1723, would end and determine, for fifty-seven years and a half thence next ensuing—Elizabeth Hinchliffe and the plaintiff covenanting to "keep the said messuage or tenement, and all other erections and buildings built or that should or might be built on the said demised ground, or any part thereof, and all the walls, pavements, fences, pipes, gutters, watercourses, privies, sinks, drains, sewers, and appurtenances belonging or that should or might be made or belong to the said demised premises, or any part thereof, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever."

Covenant to repair.

That Elizabeth Hinchliffe died in 1826.

That, by indenture of the 14th July, 1730, the executors of Barlow and Andrews demised to Richard Oakman a piece of Upper Hill Field, fronting towards the East seventy-five feet on the land demised to Gray and Brown, and towards the North forty feet on the land demised to Umpleby: to hold from Lady-Day then last, for ninety-two years, at the rent of 5*l.* 15*s.* per annum.

July 14, 1730—Demise to Oakman.

That, by indenture of the 15th July, 1730, the executors of Barlow and Andrews demised to James Richards the ground immediately adjoining the passage in the declaration mentioned, described as fronting Green Street for 50 feet towards the North, and towards the West for 75 feet a way or passage leased to Gray and Brown, as the same was more plainly described in the scheme or plan thereof drawn in the margin of the indenture: to hold from Lady-Day then last, for 92 years, at the rent of 10*l.*

July 15, 1730—Demise to Richards.

That, by indenture of the 16th July, 1730, the executors of Barlow and Andrews demised to Roger Morris a further part of Upper Hill Field, fronting towards the West 150 feet on the lands demised to Richards and Gray and Brown, and towards the North 75 feet on Green Street: to hold from Lady-Day then last, for ninety-two years, at a rent of 5*s.* per annum.

July 16, 1730—Demise to Morris.

1838.

HICHLIFFE v. The Earl of KINNOUL.

That, by indenture of the 25th of March, 1791, the then Earl Grosvenor and his trustees demised to Lord Hampden the pieces of ground above described as let to Roger Morris and to Richards, with two several messuages upon them; and the ground was described in a plan annexed to the indenture as abutting towards the West for seventy-five feet on the passage from Green Street to the Mews, towards the North for 125 feet on Green-Street, and towards the East for 150 feet on premises in the occupation of James Fisher: to hold from Lady-Day, 1824, at which time the indenture of the 2nd October, 1728, would expire, for twenty-nine years.

March 25, 1791 —Demise from Lord Grosvenor to Lord Hampden for 29 years from Lady-Day, 1824, of ground let to Morris and Richards.

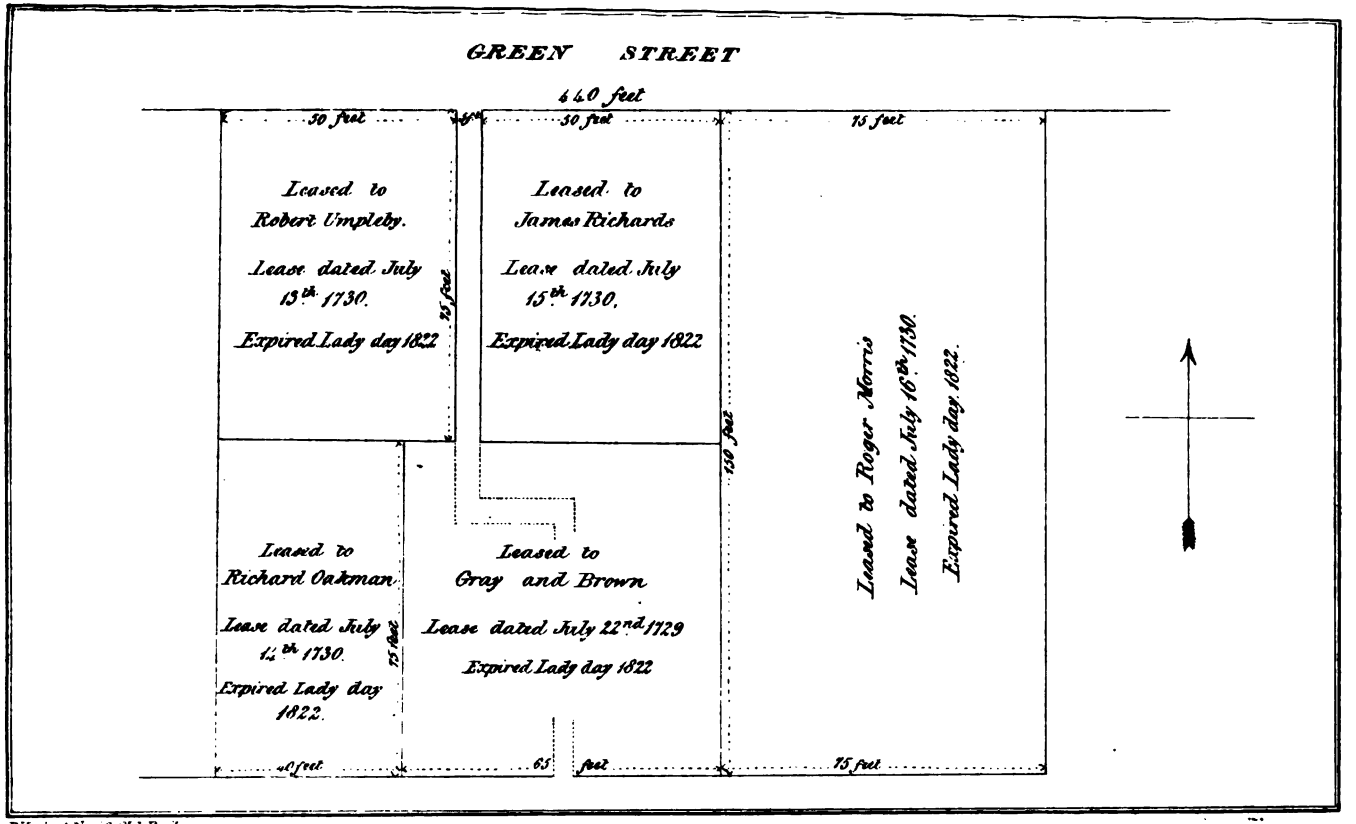
That, by an indenture of the 28th March, 1793, Isaac Lefevre (in whom the terms created by the indentures of the 22nd July, 1729, and 14th and 16th July, 1730, had vested,) assigned to Lord Hampden the parcels of ground demised by those indentures, together with the messuages &c., and all the estate &c.—to hold from thenceforth during the remainder of the term of years granted by the indenture of the 2nd October, 1728, subject to the indentures of the 22nd July, 1729, and 14th and 16th July, 1730, and the performance of the covenants in the indenture of the 2nd Oct. 1728.

March 28, 1793 —Assignment to Lord Hampden.

That, by another indenture of the 24th September, 1822, Earl Grosvenor demised to Lord Hampden the pieces of ground hereinbefore described as let to Gray and Brown, and to Oakman, with the messuages erected on them—describing the ground, pursuant to a plan annexed to the indenture, as abutting towards the East for seventy-five feet, then towards the North for fifty feet, and then towards the East for 75 feet on ground and buildings in the occupation of Lord Hampden, towards the North for 5 feet on Green Street, towards the West for 75 feet, and then towards the North for 50 feet on ground and buildings in the occupation of Mrs. Hinchliffe—to hold from the 5th April, 1824, "at which time the indenture of lease of the 2nd October, 1728, would determine," for 61 years.

Sept. 24, 1822— Demise from Lord Grosvenor to Lord Hampden of ground let to Gray and Brown and Oakman, for 61 years from the expiration of the original lease of Oct. 2, 1728.

The following is the plan referred to:—



D. Lake lith. 50 Wall Bailey.

1838.

HINCHLIFFE v. The Earl of KINNOUL.

That Lord Hampden bequeathed all his leasehold estates to his wife, and died in 1830.

That his wife died in 1833; and that her executors assigned to the defendant all the pieces of ground, messuages, &c., demised by the indentures of the 25th March, 1791, and 24th September, 1822—to hold for the said terms of twenty-nine and sixty-one years.

User of the way in question.

That, in 1789, and until the year 1822, the way or passage mentioned in the indenture of the 20th July, 1819, had been used by the public as a thoroughfare to go from Green-Street to Lee's Mews, situate at the back of the messuage of the plaintiff, and had been paved and lighted by the parish; but that, after Lord Hampden had obtained the said reversionary lease in the year 1822, he built a coach-house and stables at the South end of the passage, a little to the South of but free and clear from the coal-shoot in the declaration mentioned, and thereby prevented all persons from passing through the same, and also put a gate at the North entrance of the said way or passage, which gate has been usually from that time kept locked, and the key thereof during the time of Lord Hampden kept by his porter in the porter's hall, and since by the defendant or his servants. That, from the year 1788, down to the time of putting up the gate, the occupiers of the messuage of the plaintiff used the way or passage, for the purpose of carrying coals from Green-Street to the coal-shoot, when and as the same were wanted there; the same being done once or twice in the course of each year; and also for the purpose of doing the necessary repairs to the pipes, and to the side or wall of the messuage of the plaintiff abutting upon the way or passage, respectively, as the same were wanted—the same having been done three times since the year 1788—without any interruption whatsoever; and that, from the time of putting up the gate down to the time of the refusal and obstruction by the defendant as aforesaid, the plaintiff had used the way or passage for

1838.

HINCHLIFFE v. The Earl of KINNOUL.

the same purposes as before, by calling at the house of the defendant for the key of the gate, which had been thereupon delivered to him; he afterwards returning the key when the coals had been shot and the repairs done.

The question was whether or not the plaintiff had any right of way over the passage between his house and the defendant's.

The case was argued in Easter Term last, by *Wilde*, Serjeant, for the plaintiff, and *Sir W. Follett*, for the defendant.

Wilde, Serjeant (*Crowder* was with him), for the plaintiff.—The question is what interest passed by the lease in reversion of the 20th July, 1819, from Lord Grosvenor to the plaintiff and his mother—whether it conveyed to her any right over the passage described in the plan, on the Eastern side of the premises that were the subject of the demise. It appears from the special case, that, in October, 1728, an ancestor of Lord Grosvenor granted to two persons named Barlow and Andrews a piece of ground for a term of ninety-seven years from Lady Day, 1727. This lease would consequently expire at Lady Day, 1824.

A portion of this ground (which had then been built upon) came by indenture of June 29th, 1799, to the plaintiff's mother, for a period of twenty-one years from Midsummer-Day then last past. This lease would expire at Midsummer-Day, 1820. On the 20th July, 1819, Lord Grosvenor (in whom the reversion in fee of the premises comprised in the original lease of October, 1728, was then vested) granted to the plaintiff and his mother a further term of fifty-seven years and a half in the premises then in the occupation of the latter, "together with all the *appurtenances* to the said piece or parcel of ground, messuage or tenement, erections, buildings, and premises belonging or in any wise appertaining." The interest of the person by whom the twenty-one years' lease was granted to Mrs.

Plaintiff's title.

1838.

HINCHLIFFE v. The Earl of KINNOUL.

Hinchliffe in June, 1799, was created by an underlease dated the 27th February, 1764, for a term of sixty years and a half (wanting seven days) from Michaelmas, 1761; and would consequently expire seven days before Lady-Day, 1822.

Defendant's title.

On the 25th March, 1791, Lord Grosvenor demised to Lord Hampden the premises under lease to Richards (July 15, 1730) and to Morris (July 16, 1730), for twenty-nine years from Lady-Day, 1824, at which time the lease of the 2nd October, 1728, would expire. On the 28th March, 1793, the terms created by the indentures of the 22nd July, 1729, and the 14th and 16th July, 1730, subject to those indentures, and to the performance of the covenants in the indenture of the 2nd October, 1728, came to Lord Hampden by assignment. By indenture of the 24th September, 1822, Lord Grosvenor demised to Lord Hampden the premises let to Gray and Brown by the lease of July 22nd, 1729 (*including the passage in question*), and the ground let to Oakman by the lease of July 14th, 1730—"to hold from the 5th April, 1824, *at which time the indenture of lease of the 2nd October*, 1728, *would determine*, for sixty-one years." All the interest of Lord Hampden in these several premises came to the defendant by assignment from the executors of Lady Hampden, in 1833.

On the expiration of the original ground lease at Lady-Day, 1824, the right to the possession of the whole of the premises would revert to Lord Grosvenor, unfettered by any course of enjoyment of any part of them during the existence of the term created by that lease: and whatever he would have power to grant in possession at Lady-Day, 1824, he had power to grant in reversion before that day. Such being the right of Lord Grosvenor, what was his intention, and what the legal construction of the grant of July, 1819?

The intention of the grant can only be ascertained by a

reference to the previous known state of the premises and the course of enjoyment. The easements are of an essential nature—the supply of fuel and water, and proper drainage. A demise without any mention of appurtenances would of necessity pass the whole of these. Lord Grosvenor in the several leases he has granted expressly recognises the way in question; and without it the plaintiff cannot repair the side wall of his house, which by the terms of his lease he is bound to do.

The demise here is, of a house with *the appurtenances*. The special verdict sets forth nothing to enable the court to ascertain the meaning of the word "appurtenances." In its strict legal sense there is nothing to which the word can be applied. All deeds are so to be construed as will best effectuate the intention of the parties, and the words, being those of the grantor, are to be construed most strongly against him—*Cholmondeley* v. *Lord Clinton*, 2 B. & A. 625, and the cases there cited. In Sheppard's Touchstone, p. 89, it is said that—"When any thing is granted, all the means to attain it, and all the fruits and effects of it, are granted also, and shall pass inclusive, together with the thing, by the grant of the thing itself, without the words cum pertinentiis, or any such like words. Cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit. As, by the grant of a conusance of pleas, is granted the ordinary process to bring causes to judgment. By the grant of a ground is granted a way to it. By the grant of trees is granted withal power to cut them down and take them away. By the grant of mines is granted power to dig them: and by grant of fish in a man's pond is granted power to come upon the banks and fish for them." In Plowden, 170, it was argued that—"A man cannot aver that to be appurtenant which the law will not suffer to be appurtenant, though usage and continuance may make it a law in such things as stand with and are consonant to reason. But, in things that are

1838.

HINCHLIFFE v. The Earl of KINNOUL.

against law and reason, there usage and continuance is to no purpose, as here the pleading or averment that the land has been always appurtenant to the messuages, is an averment that that is law which is not law. And all the four justices agreed unanimously that the averment or pleading that the land has been always appurtenant to the messuage, is not good here; and also they agreed that land might not be appurtenant to a messuage in the true and proper definition of an appurtenance. But yet all of them (except Brown, J., who did not speak to this point,) agreed that the word *appertaining* to the messuage shall be here taken in the sense of *usually occupied with* the messuage, or *lying to* the messuage; for, when *appertaining* is placed with the said other words, it cannot have its proper signification, as it is said before, and therefore it shall have such signification as was intended between the parties, or else it shall be void, which it must not be by any means; for, it is commonly used in the sense of *occupied with*, or *lying to*, ut supra, and, being placed with the said other words, it cannot be taken in any other sense, nor can it have any other meaning, than is agreeable with law; and forasmuch as it is commonly used in that sense, it is the office of the judges to take and expound the words which common people use to express their meaning according to their meaning, and therefore it shall be here taken not according to the true definition of it, because that does not stand with the matter, but in such sense as the party intended it. As, where a lease was made for life, and after his death that the lands *redibunt* to a stranger, it was taken as *remanebunt*, for to that purpose the party there used it, and therefore by 18 Ed. 3, it shall be taken by way of a remainder. And so a lease for life, the *reversion* to a stranger, shall be taken for a *remainder*, causa qua supra. And many other cases were put where a word shall be taken out of its natural sense, according to the sense intended by the party. So, the word 'apper-

taining' shall be here taken as *occupied, used,* or *lying* with or to the messuage, and in such sense the averment may serve to declare that the land has been always occupied with or has lain to the messuage, and the demise shall serve to convey the same to the defendant, and so the bar is good, notwithstanding the said exception." In *Hill* v. *Grange*, Dyer, 130. b., one seised of a messuage and one hundred acres of land in D., leased it by the description of "his messuage in D., with all the lands to the said messuage belonging:" and it was held, that, although land cannot strictly be appurtenant to a messuage, "yet by the words above the land passed by the intendment of the parties, and the open cognizance of the use and occupation of the land and house together." In *Morris* v. *Edgington*, 3 Taunt. 24, it was held by Sir James Mansfield, that, although no way or other easement can subsist in land of which there is an unity of possession; yet, if a lessor, having used convenient ways over his own adjoining land during his own occupation, demises premises with all ways appurtenant, unless it be shewn in evidence that there was some way appurtenant in alieno solo, to satisfy the words of the grant, it shall be intended that he meant the ways used, and they shall pass, though he miscall them appurtenant. In *Clements* v. *Lambert*, 1 Taunt. 205, and *Barlow* v. *Rhodes*, 3 Tyr. 280, 1 C. & M. 439, the words "belonging or appertaining" received a strict legal interpretation, in the absence of all evidence to shew the intention of the parties that they should be otherwise construed. The decision in *Plant* v. *James*, 2 N. & M. 517, 5 B. & Ad. 791, proceeded upon the same ground. It is uniformly laid down by the most approved text writers that the word "appurtenances" is to be construed according to the intention of the parties. And here it is to be remembered that the way in question is necessary "for the convenient and beneficial use and occupation of the said messuage."

1838.

HINCHLIFFE v. The Earl of KINNOUL.

Sir W. Follett (*Wightman* was with him), for the defendant.—Lord Grosvenor and his ancestors were during the whole of the term granted by the lease of 1728 seised as well of the premises held by the plaintiff as of those held by the defendant and those under whom they respectively claimed. That lease expired at Lady-Day, 1824. The underleases expired at Lady-Day, 1822; so that there were two years during which the party entitled under the lease of 1728 would be entitled to the whole. In 1793 the whole of the interest in the premises comprised in the lease of 1798, except those in the plaintiff's occupation, came by assignment to Lord Hampden: and on 24th September, 1822 (which was after the expiration of the several underleases), Lord Hampden obtained from Lord Grosvenor a reversionary lease of the way in question and the premises behind, for a term of sixty-one years from Lady-Day, 1824. So that, from 1822, when Lord Hampden was entitled to the actual possession of the way in question, and to the reversion, the plaintiff and his mother held only as tenants from year to year, or for some interest which does not appear upon the special verdict. What way or easement had they during those two years? It appears, that, from the year 1789 down to 1822, the way had been used as a public thoroughfare; but that, in the latter year, when Lord Hampden became possessed of the premises formerly demised to Gray and Brown, and to Oakman, he put up a gate at the entrance, which was constantly kept locked; and that the plaintiff was in the habit of applying at the defendant's house for the key whenever he wished to use the way: and such instances of user are very scanty. The sole question, therefore, is, whether or not the right of way claimed passed by the indenture of the 20th July, 1819. That it is not a way of necessity, is clear: and it is equally clear that it will not pass merely because it may be more convenient. It is said that a right of way may pass under the

1838.

HINCHLIFFE v. The Earl of KINNOUL.

word "appurtenances," if such be the clear and manifest intention of the parties. That proposition, qualified as it is, the plaintiff is not in this case interested in disputing. Lord Denman, in delivering the judgment of the court of King's Bench in *Plant* v. *James*, 5 B. & Ad. 791, 2 N. & M. 521, says: "Whether the parties intended to have included this way is a mere matter of conjecture; but the question in this and all other similar cases is, not what the parties intended to have done, but what is the meaning of the words they have used. Nothing is more clear than that, under the word 'appurtenances,' according to its legal sense, an easement which has become extinct, or which does not exist in point of law by reason of unity of ownership, does not pass—*Grymes* v. *Peacock*, 1 Bulstr. 17; *Saundeys* v. *Oliff*, Moore, 467; *Whalley* v. *Tompson*, 1 B. & P. 371; *Clements* v. *Lambert*, 1 Taunt. 205; *Barlow* v. *Rhodes*, 1 C. & M. 439, 3 Tyr. 280. If the grantor wishes to revive or create such a right, he must do it by express words, or introduce the terms 'therewith used and enjoyed,' in which case easements existing in point of fact, though not existing in point of law, would be transferred to the grantee." The judgment of the court of King's Bench in that case was reversed on error; but the opinion of the court below upon the point now in question remains unshaken. Tindal, C. J., in delivering the opinion of the court of error—*James* v. *Plant*, 4 Ad. & E. 749, 6 N. & M. 282—says: "We all agree, that, where there is a unity of seisin of the land and of the way over the land in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and that, after such extinguishment, or during such suspension of the right, the way cannot pass as an *appurtenant*, under the ordinary legal sense of that word. We agree also in the principle laid down by the court of King's Bench, that, in the case of an unity of

1838.

HINCHLIFFE v. The Earl of KINNOUL.

seisin, in order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one "used and enjoyed with the land which forms the subject matter of the conveyance." In *Morris* v. *Edgington*, the authority of which was doubted in *Barlow* v. *Rhodes*, the words were "ways and easements to the demised premises belonging and appertaining." All the other authorities cited on behalf of the plaintiff are referable to the principles laid down in *Plant* v. *James* and *James* v. *Plant*. Where a right of way is extinguished by unity of possession, it can only be revived by a new grant—Brooke's Abr. *Extinguishment*; Com. Dig. *Chimin* (D. 3); *Whalley* v. *Tompson*. In the last-mentioned case, Eyre, C. J., says: "There can be no doubt that the word 'appurtenances' may convey an existing right-of-way. But, from the moment that the possession of two closes is united in one person, all subordinate rights and easements are extinguished. *Clements* v. *Lambert*, 1 Taunt. 205, is an authority directly in point: it was there held, that, after an easement has been extinguished by unity of possession, a new easement was not created by a grant of a messuage and land with common appurtenant; though those who had occupied the tenement since the extinguishment had always used common therewith. It would be dangerous so to distort the common covenant to repair as to make it convey that which the parties may never have been contemplated.

Wilde, Serjeant, in reply.—Great inconvenience and injustice would result from the court's refusing to depart from the strict legal definition of the term "appurtenances," in order to lean to the intention of the parties. The case states the way in question to be the only one for conveying fuel and water to the house of the plaintiff; and the jury have found it to be necessary for the convenient

use and occupation of the premises. That an unity of seisin and of possession of a way and of the premises to which the way was appurtenant, may operate an extinguishment of the right of way or other easement, is not disputed: but the question does not arise here; for, there was at no time any such unity of possession in Lord Grosvenor. The difference between the rules of law and rules of construction is well pointed out by Willes, C. J., in *Parkhurst* v. *Smith*, Lessee of *Dormer*, Willes, 127: "I admit," says that very learned judge, "that, though the intent of the parties be never so clear, it cannot take place contrary to the rules of law, nor can we put words in a deed which are not there, nor put a construction on the words of a deed directly contrary to the plain sense of them. But, where the intent is plain and manifest, and the words doubtful and obscure, it is the duty of the judges (and this is that astutia which is so much commended by Lord Hobart, p. 277, in the case of *The Earl of Clanrickard*,) to endeavour to find out such a meaning in the words as will best answer the intent of the parties." With regard to the small number of the instances of user proved here, it is to be observed, that, from the nature of the right claimed, the instances of user must of necessity be few in number.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—

This special verdict which has been found upon the third, seventh, and ninth issues stated in the pleadings, raises the question of the existence of the right claimed by the plaintiff in his declaration, viz. the right to pass over and upon the passage adjoining to and abutting on the plaintiff's messuage, for the purpose of using the coal-shoot placed in the passage, and filling the plaintiff's coal-cellar, being part and parcel of his messuage, and also for

1838.

HINCHLIFFE v. The Earl of KINNOUL.

the purpose of cleansing, amending, and repairing the pipes for conducting water to and carrying soil from his said messuage, and amending and repairing the side or wall of the messuage itself abutting on the said passage.

The plaintiff rests his title to this right upon the exercise and enjoyment of it prior to and at the time of the granting of a lease by Robert Earl Grosvenor to the plaintiff's late mother and himself, and upon the legal operation of that lease; by which lease, bearing date the 20th July, 1819, the said Earl demised the messuage now belonging to the plaintiff by the description therein contained, and to which it will be necessary afterwards more particularly to advert, to hold to the plaintiff's late mother and himself, from Lady-Day, 1824, for the term of fifty-seven years and a half from thence next ensuing.

The defendant, on the other hand, contends that the right claimed by the plaintiff cannot be supported in law; for that such right, if it ever existed, was altogether extinguished by the unity of possession of the plaintiff's messuage and of the soil of the said passage, which, as he contends, took place in the Earl at Lady-Day, 1824, when the original ground lease, comprising as well the plaintiff's messuage as the said passage, and the various other adjoining messuages, expired by efflux of time, and let in the reversion of the said Earl: and the defendant further objects, that, unless it can pass as *an appurtenant*, it cannot exist at all, there being no words in the lease of 1819 capable of granting or creating a new right.

In order to determine the first question which has been raised between the parties, namely, whether the right claimed by the plaintiff has been extinguished by any unity of possession in the Earl, it will be necessary to ascertain precisely the legal interests of Earl Grosvenor and of the plaintiff in relation to the messuage of the plaintiff, and also the legal interests of the said Earl and of those under whom the defendant claims, in relation to

the soil of the passage of the defendant, at the time of the execution of the said lease of the 20th July, 1819. At the time of the execution of that lease, it appears from the special verdict that Mrs. Hinchliffe was in the actual possession and enjoyment of the messuage with the appurtenances in Green Street now belonging to the plaintiff, under a lease granted to her by the executors of one Mary Forrester, deceased, bearing date the 29th June, 1799, and expiring at Midsummer, 1820. By this lease the executors of the said Mary Forrester had demised the messuage and dwelling-house therein described, being the messuage in question, with the yard or garden *and appurtenances thereunto belonging, or usually occupied or enjoyed therewith*, as the same were late in the tenure or occupation of the said Mary Forrester. And it appears further that Mary Forrester herself had held, by various mesne assignments, the residue of a certain lease which had been granted to one Samuel Adams, by indenture of the 27th February, 1764, in terms of description of the premises demised not less extensive than those of her own grant. The immediate reversion expectant on the expiration of the lease so made to Mrs. Hinchliffe was therefore vested at that time in the executors of Mary Forrester, under the said indenture of lease of 1764, which reversion expired seven days before Lady-Day, 1822: and it appears from the special verdict that there was one other intermediate reversion outstanding and in existence interposed between the expiration of Adams's lease and the expiration of the original ground lease granted by the Grosvenor family on the 2nd October, 1728, and expiring at Lady-Day, 1824, on which latter day, and not until that day, the Earl's right to the actual possession would commence.

Again, with respect to *the soil of the passage* adjoining the plaintiff's messuage, it appears from the special verdict, that, at the time of granting the said reversionary lease of 1819, from Earl Grosvenor to the plaintiff and his

1838.

HINCHLIFFE v. The Earl of KINNOUL.

mother, the interest in the soil of the passage was vested in Lord Viscount Hampden, who, by indenture of the 28th March, 1793, had taken by assignment from the party in whom the several terms were vested, as well the residue of the original lease, as of the sub-lease granted to Gray and Brown, so far as related to the passage in question, and certain other parts of the premises: so that, at the time of the execution of the lease of 1819, Lord Hampden was entitled to the possession of the soil of the said passage until Lady-Day, 1824, when the original lease of 1724 would fall in, at which time, and not until which time, Earl Grosvenor would be entitled to the actual possession of such passage.

Now, the original lease of 1728 comprised a considerable tract of ground, at that time completely open and unbuilt upon; not only the spot upon which the plaintiff's messuage was afterwards erected, but the soil of the passage adjoining thereto, upon and over which the disputed right is claimed to exist; and over and above that a large extent of the surrounding ground, upon which numerous houses have been subsequently erected by various sub-lessees: and, if the Earl had made no leases in reversion prior to the expiration of the original ground lease, he would have been entitled at such expiration to the possession of the whole tract of land comprised therein, whether covered or uncovered with buildings, and also of all the messuages built thereon during the continuance of that lease; and it is obvious that such unity of seisin and possession in the Earl would have extinguished all rights and easements of every kind which might have been acquired in or over any part of the soil demised, whether by grant, user, or otherwise howsoever, as between any of the sub-lessees, during the existence of their several interests; so that, with respect to the plaintiff's messuage, any right or easement which the occupiers thereof might have acquired by adverse enjoyment in or over the passage in question

1838.

HINCHLIFFE v. The Earl of KINNOUL.

would, at the expiration of such original lease, have been entirely destroyed and extinguished. The Earl might have re-modelled the whole of the property included in the original lease in any manner he thought fit; he might have re-let the several houses, as they had been occupied before, or subdivided them into differents parts or portions, and let them with or without the rights and easements which had been before enjoyed by the several lessees of the respective houses upon or in the adjoining soil.

Such, however, in the year 1819, being the state of the interest and title of the plaintiff and of Lord Viscount Hampden in their respective properties, it appears by the special verdict that the Earl did not wait the falling in of the original lease at Lady-Day, 1824, when he would have been entitled to the actual possession of all the premises included therein; but that, on the contrary, on the 20th July, 1819, he granted to the plaintiff and his late mother the reversionary lease of the messuage now belonging to the plaintiff which has been before adverted to: and subsequently thereto, viz. on the 24th September, 1822, he granted to Lord Viscount Hampden a reversionary lease of the soil of the said passage next adjoining the plaintiff's messuage (amongst other premises), to commence at Lady-Day, 1824, and to continue for sixty-one years thence next ensuing, under which lease the present defendant the Earl of Kinnoul, now holds by assignment.

No unity of possession in Lord Grosvenor.

As to the first point, therefore, which has been raised on the argument of this case, we think it clear, upon the facts stated in this special verdict, that there was no unity of possession in the Earl both of the messuage and of the soil of the adjoining passage, at the time of the expiration of the original lease; for, that lease having been made to the original lessees, to hold, from Lady-Day, 1727, for the full term of ninety-seven years thence next ensuing, it must have expired at twelve o'clock of the night of Lady-Day, 1824. But the lease of 1819 demises to the plaintiff

1838.

HINCHLIFFE v. The Earl of KINNOUL.

and his mother, to hold, from Lady-Day, 1824, for fifty-seven years and a half thence next ensuing. The latter was, therefore, strictly and properly a reversionary lease commencing at the precise moment when the original lease terminated, and leaving no interval whatever between: and, indeed, as if to prevent the possibility of such a construction, the commencement of the lease is expressly stated to be "from Lady-Day, 1824, when the indenture of the 2nd October, 1728, would end and determine." And so again, with respect to the lease to Lord Hampden of the 24th September, 1822, the term thereby granted, although made to commence from the 5th April, 1824, (the day before Old Lady-Day), yet by the addition of the words "at which time the said indenture of lease of the 2nd October, 1728, would determine," must be held to be strictly and properly a reversionary lease. When, therefore, the original lease expired, there could be no unity of possession in Lord Grosvenor, for there was no right to the possession at all: but the several and distinct possession of the messuage in the state in which it had been before held, was continued in the lessees named in the lease of 1819; and the several and distinct possession of the passage as it had been before held by Lord Hampden, was continued in him under the lease of 1822. Not that it is absolutely necessary, for the purpose of avoiding the legal consequences of unity of possession, that *both* the leases should be reversionary; it is sufficient if there is a reversionary lease of the messuage alone. Even, therefore, if it could be contended, as to the lease of 1822, that there existed an interval between the expiration of the original lease and the commencement of the term granted by that lease to Lord Hampden, upon the ground that the original lease by the alteration of the stile expired on the 25th March, 1824, and the term newly granted was not to commence until the 5th April following; yet, in consequence of Earl Grosvenor's reversionary lease of the mes-

suage in 1819, the right to the possession of both properties was severed, and there could be no unity of possession of *both the messuage and the passage in him;* and, if so, it is obvious that he could not by his subsequent grant derogate froma former valid grant which he had already made.

We think, therefore, there is no ground for the objection that the right in dispute was extinguished by unity of possession; but that the real question between these parties turns upon the proper construction to be put upon the lease made by the Earl of Grosvenor in 1819, for, whatever effect that lease would have against the Earl, the same effect must be given to it against the present defendant, who claims only under the subsequent lease of 1822.

Construction of the lease of 20th July, 1819.

Now, at the time of the execution of the lease of 1819, it is found by the verdict that the plaintiff and his mother were in possession and occupation of the messuage in question, having a coal-shoot or coal-hole, of which the opening was in the passage, near to the house, and which ran in an oblique direction into the coal-cellar of the house; having also a water pipe under the passage, which was the sole pipe for supplying water to the house; and two other pipes, one to supply water to a closet, and the other a pipe to carry soil therefrom; of which the first entirely and the other in part passed from the interior of the house, outside the Eastern wall thereof: "*all which,*" according to the finding of the jury, "*were necessary for the convenient and beneficial use and occupation of the said messuage.*" It is further found that the occupiers of the said messuage exercised the right of passing and repassing over the said passage for the purpose of using their coal-shoot and filling their coal-cellar, and of repairing the pipes and the side or wall of their messuage when necessary, for a long time, that is, from as early a period as the year 1788, downwards; and, further, it is expressly

1838.

HINCHLIFFE v. The Earl of KINNOUL.

stated by the jury, "*that the coal-shoot could not during all the time aforesaid, and cannot be used, and that the needful and necessary repairs of the said pipes and side or wall of the said messuage could not and cannot be done, without passing and repassing upon, through, and along the said passage.*"

Such, then, being the description of the messuage itself, and of the right actually exercised and enjoyed in and upon the soil of the passage at and before the time of granting the reversionary lease, the Earl of Grosvenor on the 20th July, 1819, in consideration of a fine paid down, demises to the plaintiff and his mother the messuage or dwelling house in which they had been residing for many years past, by the description of "all that piece or parcel of ground, and the messuage or tenement, erections, and buildings thereupon, or on some part thereof erected and built, situate &c., and abutting and adjoining towards the East on the said way or passage." The lease then goes on to describe the other abuttals, the exact measurement of the land, and to refer to a plan or ground plot drawn on the margin of the indenture—"together with all and singular the *appurtenances unto the said piece or parcel of ground, messuage* or tenement, erections, buildings, and premises belonging or in anywise appertaining." And the first question arising upon the lease, granted under the circumstances above stated, is, whether the use of the coal-shoot, the water-pipe, and other pipes, passed thereby to the lessee. And we feel no doubt, upon this state of facts, that the coal-shoot, and the water-pipe and other pipes, did pass to the lessee as integral parts of the messuage or dwelling-house itself. They are stated in the special verdict to be let into and through the walls of the dwelling-house, so that, if they were stopped or cut off, the messuage or dwelling-house must be damaged and dismembered, and would no longer be the same as that which

1838.

HINCHLIFFE v. The Earl of KINNOUL.

the plaintiff and his mother had before enjoyed, and which is described in the new lease. And it must be remembered, that, at the time the Earl grants the new lease, he must be taken to know the actual state and condition of the premises which form the subject-matter of the demise: for, although, when his ancestor granted the original ground lease, in 1728, he demised a large vacant piece of ground, in 1819 the Earl demised a messuage or dwelling-house of a certain definite and known shape, size, and character, consisting of certain parts and additions, as it then actually stood. We cannot, therefore, feel any doubt but that, under the description contained in the lease, the coal-shoot and the several pipes passed to the lessee as a constituent part of the messuage or dwelling-house itself.

Right of way passed as a necessary incident.

The next question which then arises, and that upon which the determination of the present case rests, is, whether the right of passing and repassing over the soil of the passage, and using it for the purposes above mentioned, did also pass to the lessees under this lease. And we are of opinion, that, upon the facts found in this special verdict, such right did pass as a necessary incident to the subject-matter actually demised, although not specially named in the lease. The rule laid down in Plowden's Commentaries, 16 a., is, "that, by the grant of any thing, conceditur et id sine quâ res ipsa haberi non potest; as, if one grants his trees, the grantee may enter upon his land for the cutting down and carrying them away," for which the authority of the Year Book, 2 Ric. 2, is cited. And, again, Twisden J., in *Pomfret* v. *Ricroft*, 1 Saund. 322, lays down the rule of law to be—"When the use of a thing is granted, every thing is granted by which the grantee may have and enjoy such use. As, if a man gives me a license to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another

1838.

HINCHLIFFE v. The Earl of KINNOUL.

and not to me." Now, in the present case, the jury have expressly found in their verdict, that the passing and repassing over the way or passage is not merely *convenient* but *necessary* " for the use of the coal-shoot, and of the pipes, and for the repairing and amending the same and the side or wall of the house;" to the performance of which, it is also to be observed, the lessees are expressly bound by the covenant entered into by them with the lessor by the same lease.

Since, therefore, as it appears to us, the right in question passed to the lessees under the reversionary lease of 1819, as incidental to the enjoyment of that which was the clear and manifest subject-matter of demise, it becomes unnecessary to consider the question argued at the bar before us, how far the same right might or might not pass to the lessees under the express words of the lease itself, as an "appurtenant unto the said piece or parcel of ground, messuage or tenement, erections, buildings, and premises belonging or appertaining." There are strong authorities in the law books to shew these words capable of a wider interpretation, and of carrying more than is *an appurtenant* in the strictly legal sense of that word, where such interpretation is necessary in order to give that word some operation. Such are the cases in F. Moore's Reports, 682, *Archer* v. *Bennett*, 1 Lev. 131, Sid. 211, *Hill* v. *Grainge*, Plowd. Com. 170, and others. But we think it at once sufficient, and at the same time safer, to rely upon the ground on which we have already held that the right claimed by the plaintiff may be supported, and to give no opinion upon the second point.

Upon the whole, it appears, upon the facts stated in this special verdict, that the ground upon which the defendant has principally relied for the extinguishment of the right set up by the plaintiff, viz. the unity of possession of the messuage and of the soil of the passage over which such right is claimed, does not exist; that the way in question

1838.

HINCHLIFFE v. The Earl of KINNOUL.

was in fact enjoyed in alieno solo at the date of the lease, and that the same was necessary for the use and repair of the coal-shoot, pipes, and side or wall of the house; that the lease was made by the person entitled to the reversion both of the messuage and the soil of the passage, that is, by a person who had the power to grant or to continue the existence of such right at the time the lease was to come into operation and effect; and that, if the words of the lease will admit of such a construction, it was the apparent intention of the parties to that instrument, arising from the state and circumstances of the property, and the language of the instrument itself, that they should be so construed: more especially when it is observed that the lessor, at the time he is making a reversionary demise of the messuage which has been built upon his land during the existence of the original lease, requires from the lessee a covenant to repair and keep in repair the said messuage and all other erections that should be built, and to purge, scour, and cleanse all pipes &c. made or to be made—words that are peculiarly applicable to the existing state of the premises.

Under these circumstances, we think, in supporting the right claimed, upon the legal principle on which we have placed it, without laying down that the easement or right is included in the express words of the lease, we do no more than carry into effect the intention of the parties themselves. We therefore give judgment for the plaintiff.

Judgment for the plaintiff.

1838.

Tuesday, June 12th.

CURLING *v.* SEDGER.

Pending an action brought by an attorney of this court for the recovery of a bill of charges for business done in the Central Criminal Court, it is competent to a judge of either of the superior courts to make an order for the taxation of such bill.

And *semble* that this power is independent of the statute 2 Geo. 2, c. 23, s. 23.

The rights of a party to have a signed bill delivered, and to have it referred for taxation, are correlative.

AN action having been brought in this court by an attorney of the court for the recovery of a bill of costs for business done for the defendant in the conduct of a prosecution in the Central Criminal Court, and for attendances at a Metropolitan police office—Lord Abinger, at the instance of the defendant, made an order for referring the bill to be taxed by one of the Masters of this court.

Stephen, Serjeant, in Easter Term last, obtained a rule nisi to discharge the order, on the ground that a bill for such business was not taxable.—To bring a case within the statute 2 Geo. 2, c. 23, s. 23, it is requisite that the business should have been transacted in a court wherein attornies alone are authorized to practise, and having a taxing officer. None but attornies of one of the superior courts can practise in the county court—12 Geo. 2, c. 13, s. 7—or in the courts of Quarter Sessions—22 Geo. 2, c. 46, s. 12; and these statutes, being in pari materiâ, have received in this respect the same construction as the 2 Geo. 2, c. 23—*Sylvester* v. *Webster*, 9 Bing. 388, 2 M. & Scott, 506. In the Central Criminal Court, however, the practice is not so restrained; it needs no qualification to enable a party to practise there. In *Becke* v. *Wells*, 1 C. & M. 75, 3 Tyr. 193, it was expressly decided that a bill for business done in the Middlesex county court is not within the statute.

He produced affidavits stating that there is no officer in the Central Criminal Court whose duty it is to tax bills of costs as between party and party or attorney and client; and that Mr. Justice Littledale and Mr. Justice Williams had in similar cases refused to make orders for referring bills to be taxed.

1838.

CURLING v. SEDGER.

Wilde, Serjeant, and *Smythies*, on a subsequent day in the same term, shewed cause. The 23rd section of the 2 Geo. 2, c. 23, enacts "that no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at law or in equity, until the expiration of one month or more after such attorney or solicitor respectively shall have delivered unto the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their dwelling-house or last place of abode a bill of such fees, charges, and disbursements, written in a common legible hand, &c., which bill shall be subscribed with the proper hand of such attorney or solicitor respectively; and, upon application of the party or parties chargeable by such bill, or of any other person in that behalf authorized, unto the said Lord High Chancellor, or the Master of the Rolls, or unto any of the courts aforesaid, or unto a judge or baron of any of the said courts respectively in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted, and upon the submission of the said party or parties, or such other person authorized as aforesaid, to pay the whole sum that upon taxation of the said bill shall appear to be due to the said attorney or solicitor respectively, it shall and may be lawful for the said Lord High Chancellor, &c., respectively, and they are hereby required, to refer the said bills, and the said attorney's or solicitor's demand thereupon (although no action or suit shall be then depending in such court touching the same), to be taxed and settled by the proper officer of such court without any money being brought into the said court for that purpose," &c. &c. In *Smith* v. *Taylor*, 5 M. & P. 66, 7 Bing. 259, the statute was held to be remedial. A bill for business done at the Quarter Sessions, is taxable—*Ex parte Williams*, 4 T. R. 124, 496; *Clarke* v. *Donovan*, 5 T. R. 694, 1 Esp. 137; *Sylvester* v. *Webster*, 2 M. & Scott,

2 Geo. 2, c. 23, s. 23.

Act remedial.

Business at quarter sessions,

1838.

CURLING v. SEDGER.

506, 9 Bing. 388, 1 Dowl. 708. Speaking of the cases of *Ex parte Williams* and *Clarke* v. *Donovan*, Tindal, C. J., in delivering the judgment of this court in *Sylvester* v. *Webster*, says: "It is an additional argument in support of the construction which they give to the statute 2 Geo. 2, that, by the subsequent statute 22 Geo. 2, c. 46, s. 12, it is enacted 'that no person whatsoever shall act as an attorney at any General or Quarter Sessions of the Peace for any county &c. within the kingdom, either with respect to matters of a criminal or civil nature, unless such person shall have been admitted an attorney of one of his majesty's courts of record at Westminster, and duly inrolled pursuant to the act 2 Geo. 2.' Construing the two statutes, therefore, as made in pari materiâ, there seems to be no reason why the action by the very same person to recover fees for business done in the court of Quarter Sessions should not be considered as subject to the same law as the action 'for fees, charges, and disbursemements at law or in equity,' are expressly subjected to by the statute 2 Geo. 2." In *Smith* v. *Wattleworth*, 6 D. & R. 510, 4 B. & C. 364, 1 C. & P. 615, it was held that an agent appointed to practise in the insolvent debtors court, if he be an attorney of any of the superior courts of record, cannot recover his bill of costs for business done in procuring the discharge of an insolvent debtor, without delivering his bill one month before action brought, pursuant to the provisions of the statute. Abbott, C. J., there says: "The first question is, whether this was business done at law. Now, if it is business done in order to obtain the liberation of a party from arrest by process issuing from a court of law, then it comes within the words of the statute. If an attorney cannot bring an action for business done at a court of Quarter Sessions without delivering his bill one month beforehand, I cannot distinguish this case in principle from that. The difficulty which at first struck me was this,

in the insolvent debtors court,

1838.

CURLING v. SEDGER.

that the court for the relief of insolvent debtors may admit persons to practise as agents in their court, who are not attornies of the superior courts; and it is said—shall the business of an agent who is an attorney of this court be taxable, when the business of an agent who is not an attorney would not be taxable? I was a good deal struck by that argument, but I do not think it is conclusive of this question. There may be business done in other courts of law by persons who are not attornies, which is not taxable. A great deal of that which is usually done by an attorney at Quarter Sessions, may be done by a person who is not an attorney, such as serving notices, subpœnaing witnesses, and doing a great many other things which are done in such courts. Suppose a person to be employed by another to subpœna witnesses, serve notices, attend a trial, and take care of the witnesses, there is no doubt he would be entitled to remuneration for his services; but this court would not have authority to tax the bill he should deliver. So also, if the court for the relief of insolvent debtors admits persons to practise there who are not attornies of the superior courts, the bills of such persons would not be taxable here; and therefore the argument urged for the plaintiff does not appear to me to be an answer to the objection now made. The plaintiff is an attorney of this court; he has done business for another, which I consider to be business at law; and consequently the statute 2 Geo. 2 appears to me to attach upon it." This disposes of one of the arguments urged when this rule was moved for—that the practice in the Central Criminal Court is not necessarily confined to attornies, but may be conducted by persons over whom the courts of law have no jurisdiction. In *Wardle* v. *Nicholson*, 4 B. & Ad. 469, 1 N. & M. 355, business done in the county court was held to be within the statute. Patteson, J., there says: "It seems to me that the 2 Geo. 2, c. 23, is not limited to practitioners doing business in courts of re-

in the county court, and

1838.

CURLING v. SEDGER.

for obtaining a bankrupt's certificate—within the statute.

Lunacy.

cord. The words are general—'no attorney or solicitor of the courts aforesaid shall commence any action for fees, charges, &c., at law or in equity.'" A bill for business done for a bankrupt in obtaining his certificate, is within the statute—*Collins* v. *Nicholson*, 2 Taunt. 321, 1 Rose, 119: and there is nothing in the case of *Jones* v. *Bycwater*, 1 Dowl. 557, 2 Tyr. 402, 2 C. & J. 37, that is inconsistent with the notion that a bill for business done in the prosecution of a commission of lunacy is not taxable. Lord Lyndhurst there says: "It is not necessary for us to decide whether this is a bill taxable or not. If it is taxable, the Chancellor has jurisdiction over it; and if it is a bill which ought to be taxed, it will be better taxed by the officers of the Chancellor, who are accustomed to proceedings in lunacy. We think, therefore, the application should be made to the Chancellor; but we give no opinion whether the application ought to be granted."

The Central Criminal Court, where the business in question was done, and the practice of which is regulated by the 3 & 4 Will. 4, c. 36, is a court of record, of which all the judges are members, and has the same power to award costs, by s. 12, as the court as formerly constituted had by the 58 Geo. 3, c. 70, ss. 4, 6, 8; and it would be extremely inconvenient if there were no power to refer bills for business done there to taxation (44). Considering the constitution of the court, and regard being had to the fact of this being a bill for business done *in a court of law*, and by an attorney of this court, there can be no doubt as to the power of the court to order it to be taxed. The objection on the part of the plaintiff arises out of the case of *Becke* v. *Wells*, 1 C. & M. 75, 3 Tyr. 193, where it was held that a bill for business done in the Middlesex county court is not taxable. But that case is inconsistent with

(45) The expenses provided for by these acts are expenses of prosecutors and witnesses, to be paid out of the county rate, not costs as between attorney and client or party and party.

1838.

CURLING v. SEDGER.

Wardle v. *Nicholson*, 4 Ad. & E. 469, 1 N. & M. 355, and was decided solely upon the ground that the county court has no taxing officer—an objection that would equally apply to the court of Quarter Sessions: and the Middlesex county court is in fact a mere court of requests.

Stephen, Serjeant, and *Channell*, in support of the rule.—In *Ex parte Williams*, and in *Clarke* v. *Donovan*, the court of King's Bench decided, not upon a construction of the statute (which they seemed to think did not authorize the reference to taxation of a bill for business done at the Quarter Sessions), but in virtue of the practice that had obtained. The establishment of the Central Criminal Court being of a very modern date, no such practice can here be urged: it is only by the express words of the statute that this court can deprive the plaintiff of his right to have his demand submitted to the consideration of a jury. The words of the act are perfectly plain and intelligible: the reference must be by the court in which the business is done, and to the officer of that court—*Ashton* v. *Molineux*, Barnes, 95 (46). It is upon this principle that the bill of a solicitor for business in parliament is held not to be within the statute—*Williams* v. *Odell*, 4 Price, 279. The right to practice in the Central Criminal Court not being confined to attornies, it will follow, if this order be sustained, that the bill of an attorney for business done there will be liable to taxation, but that of an uncertificated person will not. The only taxing officer in that court, is, the clerk of the arraigns, and his duty is, to ascertain the allowance to be paid by the county to prosecutors and witnesses, not to tax costs as between attorney and client or party and party. At

(46) There the action was brought in this court by an attorney to recover the amount of his bill of costs for business done in Doncaster Court, Yorkshire; and, upon cause shewn against the rule, it appeared that *the bill had been taxed by the proper officer there.*

1838.

CURLING v. SEDGER.

the Quarter Sessions, there is a taxing officer, viz. the clerk of the peace. *Smith* v. *Wattleworth*, 6 D. & R. 510, 4 B. & C. 364, 1 C. & P. 615, when rightly understood, will be found to be in principle an authority for the plaintiff. Lord Chief Justice Abbott seems to have overlooked the statute 12 Geo. 2, c. 13, s. 7, which prohibits (under a penalty of 20*l.*) persons from practising in the county court who are not legally admitted as attorneys according to the 2 Geo. 2, c. 23 (47), and the 22 Geo. 2, c. 46, s. 12, which contains the same prohibition, with a penalty of 50*l.*, as to practising at the Quarter Sessions. *Sylvester* v. *Webster* and *Wardle* v. *Nicholson* turned upon the party's right to have a signed bill delivered, which is a totally different question from that now before the court. In *Stephenson* v. *Taylor*, 4 T. R. 124, n., where an action was brought for business done by the plaintiff as an attorney in conducting a prosecution at the Quarter Sessions for the defendant, no signed bill having been delivered—Buller, J., was of opinion "that by the 2 Geo. 2, which required an attorney to deliver his bill, it was not necessary to do so for business done at the sessions; the statute only prescribing it in case of business done in a court of record wherein attornies are admissible and sworn." In *Ex parte Partridge*, 2 Mer. 500, 3 Swanst. 398, the Lord Chancellor, disregarding the rule laid down in *Ex parte Williams*, held that the court of Chancery had no jurisdiction to order the taxation of a solicitor's bill of costs for business done in a cause in the court of Great Sessions in Wales. And the same doctrine was held by the court of King's Bench in *Ex parte King*, 3 N. & M. 437. [*Park*, J.—There, there was no action

Courts of Great Sessions, Wales.

(47) "If an attorney could act in a county court without being an attorney of a court of record, an argument might be raised in favour of the present plaintiff, though I do not say the argument would be good; but that is entirely taken away by the 12 Geo. 2, c. 13."—Per Patteson, J., in Wardle v. Nicholson, 1 N. & M. 367.

pending.—*Coltman*, J.—Mr. Tidd, in his Practice, 9th edit., 329, cites a MS. case of *Lloyd* v. *Maund*, T. 25 Geo. 3, K. B., where a bill for business done in a criminal suit in the court of Great Sessions at Carmarthen, was referred to be taxed: and though it was objected that it would be impossible for the master to tax the costs in Wales, not knowing the practice there; yet the court held that he could as well tax these costs as costs in the spiritual court (Doug. 199, n.); and, if he were at a loss, he might call in assistance.] The practice in the courts of Sessions in Wales was confined to attornies; and there were taxing officers in those courts. The notion that formerly prevailed as to the inherent jurisdiction of the courts, in virtue of their general authority over their own officers, to refer bills to taxation, independently of the statute (see *Anonymous*, 2 Chit. 155; *Wilson* v. *Gutteridge*, 4 D. & R. 736, 3 B. & C. 157; *Rex* v. *Bach*, 9 Price, 349; and *Watson* v. *Postan*, 2 Tyr. 406, 2 C. & J. 370, 1 Dowl. 556), is now exploded—*Dagley* v. *Kentish*, 2 B. & Ad. 411, 1 Dowl. 331; *Howard* v. *Groom*, 4 Dowl. 21; *Doe* d. *Palmer* v. *Roe*, 4 Dowl. 95; *Ex parte Bowles*, 1 Scott, 583, 1 New Cases, 632.

As to the general jurisdiction.

The result of the authorities on both sides appears to be as follows:—In support of the exclusion of the present case from the operation of the statute, are, *Ashton* v. *Molineux*, *Stephenson* v. *Taylor*, *Ex parte Partridge*, *Ex parte King*, *Williams* v. *Odell*, and *Becke* v. *Wells*. On the other side are, *Ex parte Williams* and *Clarke* v. *Donovan*, which were determined with reference to a supposed practice, *Slyvester* v. *Webster* and *Wardle* v. *Nicholson*, where this precise point did not arise, and *Smith* v. *Wattleworth*, which proceeded upon an erroneous impression.

TINDAL, C. J.—This being a matter upon which it is expedient that the practice of the courts should be uni-

1838.

CURLING v. SEDGER.

form, we will defer giving our judgment until we have had an opportunity of consulting the other judges.

Cur. adv. vult.

TINDAL, C. J., now delivered the opinion of the court:

The short question in this case is, whether or not, pending an action brought by an attorney of this court for the recovery of his bill of charges for business done in the Central Criminal Court, a judge may make an order for the taxation of such bill, upon the usual terms. And we are of opinion that such order may be made.

That the action is brought for fees, charges, and disbursements *at law*, within the meaning of the statute, appears to us to follow from the consideration of the constitution of the court in which the business was done. The Central Criminal Court is a common law court of oyer and terminer and general gaol delivery, a court which has been held for centuries for the city of London and for the county of Middlesex, and which has been so far only altered and modified by the provisions contained in the late statute 4 & 5 Will. 4, c. 36, as is necessary for the purpose of comprehending certain defined parts of the adjacent counties within the jurisdiction of the court. The bill, therefore, falls within the first part of the 23rd section of the 2 Geo. 2, c. 23, as a bill that must be delivered a month before action brought: upon the same principle that a bill for business done at Quarter Sessions has been held to fall within that provision of the statute. And undoubtedly the general understanding and practice in the profession has always been, that, where the attorney's bill is necessarily to be delivered under the statute before action brought, the same falls also within the second branch of the statute, and may be referred to be taxed.

Constitution of the court.

Where required to be delivered, bill taxable.

Taxing officer.

One objection has been relied upon against the application of the statute to this case, namely, that there is no

1838.

CURLING v. SADGER.

taxing officer of the Central Criminal Court; whereas, at the Quarter Sessions, as it is alleged, there is a taxing officer—the clerk of the peace. But we think the clerk of the crown in the Central Criminal Court must be considered for this purpose as standing precisely in the same place as the clerk of the peace at the Quarter Sessions. The clerk of the peace is not in strictness a taxing officer, as between the attorney and client; although his duty calls upon him to regulate the charges in the attorney's bill as between the prosecutor and the county: and as he has been considered a taxing officer, there seems no real distinction between him and the clerk of the crown.

But we rest our opinion principally upon the latter part of the 23rd section, by which the judges of the respective courts are required to "refer the said bill, and the attorney's demand thereupon, to be taxed, *although no action or suit shall be then depending in such court touching the same:*" for, we think those words do by necessary implication recognise the authority of the court as existing before and at the time the statute was passed, to refer the attorney's bill to be taxed, where it is for charges *at law*, and where the attorney has brought his action to recover the amount, and such action is still depending in the court to which application is made. We therefore think the present rule must be discharged.

Extent of the court's authority.

Rule discharged.

TARLETON *v.* DUMELOW.

Saturday, June 9th.

ASSUMPSIT on an attorney's bill, and for money lent &c. Pleas—non assumpsit, payment, and set-off. At the last Assizes for the county of Warwick the cause was referred. The arbitrator directed a verdict to be entered

The right of a defendant to costs under the 43 Geo. 3, c. 46, s. 3, cannot be in any way affected by what passes at the trial or before an arbitrator; but must depend upon matters brought before the court upon affidavit.

1838.

TARLETON v. DUMELOW.

for the plaintiff on the first issue for 44*l.* 9*s.* 3*d.*—for the defendant on the second issue as to 1*l.* 8*s.* 3*d.*—and for the defendant on the third issue as to the 13*l.* And the arbitrator stated upon his award that he found the following facts with reference to the arrest of the defendant, that is to say, "that the plaintiff was an attorney, and that his demand was in respect of a bill of costs and for money lent, and that, *at the time of the arrest*, the plaintiff knew that he was entitled to recover the sum of 43*l.* 1*s.* only, without taking into account the set-off thereinafter mentioned; and that, at the time of the said arrest, the plaintiff knew that there was a sum due from him to the defendant for the rent of certain lodgings of the defendant by him let to the plaintiff, and which rent the arbitrator found amounted to 13*l.*:" and the arbitrator further found "that the plaintiff arrested the defendant for a sum in computing which no allowance was made by him for the rent so due from him to the defendant; and that, after setting off the sums found by the award to be due to the defendant against that found due to the plaintiff, there was a balance of 30*l.* 1*s.* due from the defendant to the plaintiff."

The defendant was held to bail for 40*l.* It was made a condition of the reference, that it should not prejudice the defendant's right to move for costs under the 43 Geo. 3, c. 46, s. 3.

Humfrey, on a former day, obtained a rule nisi, upon an affidavit setting out the above facts.

Balguy now shewed cause, upon an affidavit of the plaintiff, stating, that, at the time of commencing this action, the defendant was justly and truly indebted to the deponent in the sum of 53*l.* 1*s.*; that, on the 9th November, 1837 (the day after the issuing of the writ), the defendant called at the deponent's office, and, after some

conversation respecting the action, paid the deponent 10*l.* on account, and promised to pay the residue of the demand; and that the deponent had, previously to the commencement of the action, had several interviews with the defendant upon the subject of the debt, and on some of those occasions the sum of 53*l.* 1*s.* was mentioned, and the particulars thereof shewn to the defendant, and the defendant never questioned the correctness of the amount, but only asked for time.—The finding of the arbitrator that the plaintiff knew of the alleged set-off, is perfectly immaterial. Before this rule can be made absolute, the defendant must make it appear to the satisfaction of the court that the plaintiff had no reasonable or probable cause for holding the defendant to bail in the sum of 40*l.* In *White* v. *Prickett*, 4 New Cases, 237, 5 Scott, 610, the defendant being arrested for 28*l.*, pleaded the statute of limitations as to 11*l.*, and the plaintiff recovered only 17*l.* The defendant having promised orally, several times within a short period before the action, to pay the 11*l.*: it was held that he was not entitled to costs under the 43 Geo. 3, c. 46, s. 3.

Humfrey, in support of his rule.—The finding of the arbitrator, that, at the time of the arrest, the plaintiff knew that he was only entitled to recover 43*l.* 1*s.*, without taking into account the set-off of 13*l.*, clearly shews that the plaintiff had not reasonable or probable cause for holding the defendant to bail for the sum indorsed on the writ. [*Tindal*, C. J.—Suppose the verdict had been returned by a jury, would these affidavits have sufficed to entitle the defendant to succeed upon this motion?] It is conceived that they would, provided the jury had found as the arbitrator has found.

TINDAL, C. J.—I think this case is not brought within the statute. It is clear, that, if a plaintiff arrests the de-

1838.

TARLETON v. DUMELOW.

fendant for the full amount due on the one side, being conscious that the defendant has a set-off, the case would be within the statute. But here it appears that the defendant was arrested for 40*l.*, and the plaintiff recovered a verdict for 30*l.*, 10*l.* having been paid by the defendant to the plaintiff the day after the issuing of the writ. It appears from the affidavits filed on the part of the plaintiff that the defendant had several times before the commencement of the action admitted the correctness of the account, and promised to pay the amount. Upon this conflict of affidavits, how can we say that the defendant has made it appear to our satisfaction that the plaintiff had not any reasonable or probable cause for causing him to be arrested and held to special bail in the sum sworn to? The whole difficulty here has arisen from the finding of the arbitrator, that, *at the time of the arrest*, the plaintiff knew that he was entitled to 43*l.* 1*s.* only, without taking into account the set-off, and made the arrest without allowing such set-off. At the time the 10*l.* were paid, the writ was issued; the plaintiff therefore had then done all that was to be done by him: and he is not to be prejudiced by a payment made after action brought, unless, it is made distinctly to appear that he wilfully went on to cause the arrest for too large a sum. The rule must, I think, be discharged.

PARK, J., concurred.

VAUGHAN, J.—I am of the same opinion. The statute contains some words that do not appear to have been sufficiently attended to. The court is to be satisfied "upon hearing the parties by affidavit." What appears before the arbitrator is perfectly immaterial. Each case of this description must depend upon its own peculiar circumstances. The absence of reasonable or probable cause is not made out here.

1838.

TARLETON v. DUMELOW.

COLTMAN, J.—In *Spooner* v. *Danks*, 5 M. & P. 701, 7 Bing. 772, 1 Dowl. 232, it was held, that, in order to entitle a defendant to costs under this statute, *he* must shew to the satisfaction of the court that the plaintiff had no reasonable or probable cause for the arrest. The defendant in this case has failed in doing that. If the defendant had paid 10*l.* between the swearing of the affidavit and the arrest, that would reconcile the statement made by the arbitrator, and still the plaintiff would not be liable to costs under the statute.

Rule discharged.

RAINE *v.* ALDERSON and STANWIX.

Tuesday, June 12th.

Land was held by A. and B. under two several demises from C.:—Held, that C. might maintain an action on the case against the owner of adjoining land, for digging coal under the land in the tenure of A. and B., to the injury of his reversion.

CASE for an injury to the plaintiff's reversionary interest in two cottages.

The first count of the declaration stated, that, before and at the time of committing the grievances thereinafter mentioned, &c., a certain cottage, and the land and soil whereon the said cottage stood, with the appurtenances, situate in &c., was in the possession and occupation of a certain person, to wit, one C. Peart, as tenant thereof to the plaintiff, the reversion &c. belonging to the plaintiff; and that, before and at the time &c., a certain other cottage, and the land and soil whereon the said cottage stood, with the appurtenances, situate in &c. aforesaid, was in the possession and occupation of G. Maugham as tenant thereof to the plaintiff, the reversion &c. belonging to the plaintiff; yet the defendants, well knowing the premises, but contriving &c. to injure the plaintiff in his said reversionary estates and interests of and in the said cottages &c., whilst the said cottages &c., were so in the several occupations &c. of the said tenants as such tenants thereof to the plaintiff, and during the continuance of the said several tenancies, to wit, on &c., and on divers days &c., wrong-

1838.

RAINE v. ALDERSON.

fully and unjustly &c., and against the will of the plaintiff, did make or cause to be made five levels, five mines, &c., under, along, and through the said earth and soil on which the said first-mentioned cottage stood, and five levels, five mines, &c., under, along, and through the said earth and soil on which the said secondly-mentioned cottage stood, and out of the said levels, mines, &c., there got and dug divers large quantities of coal, &c., of the plaintiff, to wit, one thousand tons of coal and one thousand tons of stones, of great value, to wit, &c., out of each of the said levels &c, and converted the same to their own use; by reason of which premises respectively the said several cottages were respectively undermined, and did severally crack, sink, &c., and became and were permanently lessened in value, and unsafe for habitation; by reason of which said premises, the plaintiff was greatly injured in his said several reversionary estates and interests in the said cottages &c., and by reason thereof the said tenants were obliged to and did quit the said cottages respectively, whereby the plaintiff was prevented from acquiring divers large sums of money which would otherwise have accrued to him from the said tenants respectively for the rent of the said cottages.

Second count.

The second count stated, that, before and at the time of committing the grievances &c., a certain cottage, situate &c., and contiguous to the land of the defendant Stanwix, was in the possession and occupation of Peart as tenant thereof to the plaintiff, the reversion &c. belonging to the plaintiff; that, before and at the time &c., a certain other cottage situate &c., and also contiguous to the land of the defendant Stanwix, was in the possession and occupation of Maugham as tenant thereof to the plaintiff, the reversion &c. belonging to the plaintiff; and that, before and at the time &c., the plaintiff was possessed of certain other buildings, consisting of a butcher's shop, a stable, and a messuage and dwelling-house, situate &c., and contiguous

&c.; which said cottages &c. at the several times &c. were respectively antient cottages &c., and before and at the several times when &c. respectively ought to have been and still ought to be sufficiently supported by the soil of the said land of Stanwix: yet the defendants, well knowing the premises, but contriving &c., on &c., and on divers other days and times &c., did wrongfully and unjustly, and against the will of the plaintiff, excavate &c. divers, to wit, five mines, in the said land of Stanwix, under the surface thereof, and so near to the said cottages &c. of the plaintiff, that, by reason of the said several premises, the soil of the said land of Stanwix ceased to be a sufficient support to the said cottages &c., and the said several cottages &c. did severally sink and become dilapidated &c.; by reason of which said several premises the plaintiff was greatly injured &c., and the said tenants had been forced to quit, &c. &c.

The defendants pleaded not guilty.

At the trial of this cause before Coleridge, J., at the last Spring Assizes at Durham, an action of trespass between the same parties for the act which occasioned the injury having been previously tried, no witnesses were called, but it was agreed that the evidence given on the former occasion should be read over from the learned judge's notes.

It appeared that the plaintiff was the owner and occupier of a house and land in the county of Durham, and also the owner of two cottages and other premises adjacent, in the occupation of certain tenants; that the defendant Stanwix was the lessee of certain coal-mines in the neighbourhood; that the defendants worked the coal from under the plaintiff's house and cottages, and thereby occasioned what is called in the mining districts a "creep," or decline of the subsoil, and the walls of the cottages were shaken.

On the part of the defendant it was contended that the present action was misconceived, the alleged injury to

1838.

RAINE v. ALDERSON.

plaintiff by the settlement of the cottages being immediate, and therefore properly the subject of an action of trespass; and consequently that a compensation for the injury for which this action was brought might have been recovered as special damage in the former, which was trespass for digging the coal, and in which the plaintiff obtained a verdict, as well for the value of the coal taken from under the cottages, as of that taken from under the house and land in the plaintiff's own occupation.

The learned judge left it to the jury to say whether the injury to the cottages was the result of the excavations under the cottages or under the adjoining land in the plaintiff's own occupation. The jury found for the plaintiff, and leave was reserved to the defendant to move to enter a nonsuit if the court should be of opinion that the action should have been trespass and not case.

W.H., Watson, in Easter Term last, moved accordingly. Though the cottages appeared to be in the occupation of tenants, there was no demise of the coal under them, and therefore the plaintiff's proper remedy was trespass for digging the coals, stating the injury to the cottages by way of special damage. In *Thornton* v. *Austen*, cited in *Shapcott* v. *Mugford*, 1 Lord Raym. 188, where the plaintiff brought case against the defendant, and declared that he was possessed of a close, and the defendant dug pits in it &c., per quod &c., after verdict for the plaintiff, it was adjudged that the action would not lie, because the cause of action was properly trespass, for which the party might have an action of trespass, but could not turn it into an action upon the case. The only difference between that case and the present, is, that there the nature of the action appeared upon the record; here, upon the evidence. It has at all times been deemed essential that the forms of actions should be kept distinct. In Comyns's Digest, *Action upon the Case for a Nuisance* (A.), it is said that

1838.

RAINE v. ALBERSON.

case lies "for a nuisance to the habitation or estate of another; as, if a man build an house hanging over the house of another, whereby the rain falls upon it;" "so, if he stop the ancient lights of another house:" but the authorities Comyns cites, viz., *Penruddock's* Case, 5 Rep. 100. b., and *Baten's* Case, 9 Rep. 53. b., do not bear him out; both were cases of quod permittat, where the only question was whether or not the thing complained of was a nuisance. *Wells* v. *Oddy*, 1 M. & W. 452, 8 Dowl. 799, which was an action on the case for obstructing the plaintiff's lights, will probably be relied on for the plaintiff to shew that he had his election to bring trespass or case. But the statement of the case by Lord Abinger altogether destroys the applicability of it to a state of facts like that now before the court. "The first answer to the action," says his lordship, "was, that the building (a party fence wall) was erected partly on the property of the plaintiff; and the jury have found that the obstruction is as great from the building on the plaintiff's soil, as from that on the defendant's soil also. It is said that the action should have been trespass. No case has been cited to shew, that, where an injury has been done partly by an act of trespass, and partly by that which is not an act of trespass, but the subject of an action on the case, the plaintiff is bound to adopt one or the other form of action. I can see no reason which prevents the present form of action from being resorted to, that would not be equally applicable to an action trespass. If the argument be good for any thing, that an action on the case cannot be maintained, by parity of reasoning an action of trespass could not: so that it would prove that the plaintiff is not entitled to maintain any action." [*Coltman*, J.—The second count here is clearly in case; the first looks very like trespass.] If that be so, the defendant is entitled to have the judgment arrested for the misjoinder (48).

(48) The rule was granted upon this point also, but it was afterwards abandoned.

1838.

RAINE v. ALDERSON.

Alexander and *Knowles* now shewed cause.—Under the circumstances, case was the proper form of action for the injury done to the plaintiff's reversionary interest in the cottages. Had the plaintiff been in possession of the cottages, then undoubtedly trespass would have been the proper form of action, and not case. In the absence of a reservation of mines, the lease of the ground on which the cottages stood would pass the right to all minerals under them. Thus, in Comyns's Digest, *Grant* (E. 3.), it is said, that, "if a man grant his lands, all profits within the bowels of the land pass; as mines of tin, lead, iron, coal, &c." Co. Litt. 4. a. So, in 2 Bl. Com. 18, it is said: "The word 'land' includes not only the face of the earth, but every thing under it or over it. And therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of water, by a grant of which nothing passes but a right of fishing: but the capital distinction is this, that, by the name of a castle, messuage, toft, croft, or the like, nothing else will pass except what falls with the utmost propriety under the term made use of; but by the name of land, which is nomen generalissimum, every thing terrestrial will pass." And in *Lewis* v. *Branthwaite*, 2 B. & Ad. 437, it was held, that, in copyhold lands, although the property in mines be in the lord, the possession of them is in the tenant; and therefore the latter may maintain trespass against the owner of an adjoining colliery, for breaking and entering the subsoil and taking coal therein, although no trespass be committed on the surface. So, here, the tenants would have a right to maintain trespass in respect of their possession, and consequently the plaintiff could only maintain case in respect of his reversionary interest. Besides, there are many cases to shew, that, where the injury complained of

1838.

RAINE v. ALDERSON.

is both immediate and consequential, the plaintiff may at his election waive the trespass and bring case—*Harker* v. *Birkbeck*, 3 Burr. 1561; *Lawrence* v. *Obee*, 1 Starkie, 22; *Branscomb* v. *Brydges*, 2 D. & R. 256, 1 B. & C. 145; *Smith* v. *Goodwin*, 4 B. & Ad. 413, 1 N. & M. 371; *Wells* v. *Oddy*, 1 M. & W. 452, 3 Dowl. 799. In *Thornton* v. *Austen*, the plaintiff was possessed of the close in which the trespass complained of was committed; the injury therefore was immediate, and properly the subject of an action of trespass. The plea of not guilty admits the right of property as laid in the declaration, and puts in issue only the fact of the defendants having dug the coal as charged—*Frankum* v. *The Earl of Falmouth*, 2 Ad. & E. 452, 4 N. & M. 330.

W. H. Watson, in support of his rule.—Wherever the cause of action is a trespass, an action of trespass is the proper remedy. The former action was trespass; the evidence to support the present action was the same, the only additional fact being, the injury to the cottages. It cannot be disputed that there are cases where the trespass may be waived, and a remedy sought by an action on the case; but that is where the injury complained of is consequential rather than immediate.

TINDAL, C. J.—It appears to me that the only possible doubt that could have arisen in this case has been occasioned by mixing up with it the former action of trespass. That this is in form an action upon the case, I cannot on reading the declaration entertain a doubt. The declaration in substance states that certain premises were in the possession and occupation of certain tenants of the plaintiff, the reversion belonging to the plaintiff, and that the plaintiff was injured in such his reversionary estate by a damage consequential on the abstraction by the defendants of the coal, &c., from under the land upon which the cot-

1838.

RAINE v. ANDERSON.

tages stood. The defendants have only put upon the record a plea of not guilty, thereby admitting the fact of the soil having been demised as alleged in the declaration, and the plaintiff being entitled to the reversion. A demise of the land, without qualification or restriction, is a demise of all that it contains. It appeared in evidence that the coal was taken partly from under the cottages and partly from under the land in the plaintiff's own occupation. I see no reason for holding that this action is not maintainable for digging the coal under the cottages, that being an injury to the reversion. *Wells* v. *Oddy*, if any authority were wanted would seem to come very near this case. It was there held that case was maintainable for an obstruction of the plaintiff's lights by the erection of a wall which was built half on the plaintiff's and half on the defendant's own land. Parke, B., there says: "I think an action on the case is more appropriate, though probably an action of trespass might have been maintained." So here, it may be a little uncertain whether the settlement was occasioned by the excavation of the surrounding coal or of the subsoil: but still an action on the case will lie, even though trespass might also have been maintained.

PARK, J.—I am of the same opinion. It is impossible to read this declaration without coming to the conclusion that the proper form of action has been resorted to, and that the evidence sustains it. The act complained of is equally injurious to the plaintiff's reversion as to the interests of his tenants.

VAUGHAN, J.—This is clearly the subject-matter of an action on the case. By the new rules, the plea of not guilty in case merely puts in issue the wrongful act; it admits all that is alleged by way of inducement.

COLTMAN, J.—The defendant might possibly have had good ground to contend that the damages in the first

1838.

RAINE v. ALDERSON.

action were too large, inasmuch as in that action the plaintiff appears to have recovered in respect of the coal taken from under the cottages, as well as for that taken from the land in his own occupation. But the sole question upon this record, is, whether or not the plaintiff is entitled to recover for the injury to his reversion. The demise to the tenants is admitted by the plea: and when a party is in possession of land under a demise, unless it be qualified, the lessee takes all from the centre upwards.

Rule discharged.

REYNOLDS and Another, Assignees of SHEPHERD, a Bankrupt, *v.* WEDD, and Others.

Tuesday, June 12th.

THIS was an action for money had and received brought by the plaintiffs, assignees of one Shepherd, a bankrupt, to recover from the defendants a sum of 408*l.*, which came to their hands under the following circumstances:—

The bankrupt, Shepherd, committed an act of bankruptcy on the 9th September, 1837. On the 13th, he was arrested upon process sued by the present defendants out of the Borough Court at Boston, in Lincolnshire. Shepherd deposited with the sheriff 408*l.*, being the debt, and 10*l.* for costs, pursuant to the 43 Geo. 3, c. 46, s. 2, in lieu of a bail-bond. The money was afterwards paid into court, and was on the 23rd September paid out to the present defendants, on motion, Shepherd not having put in and perfected special bail according to the statute. On the 28th a fiat issued against Shepherd, and the plaintiffs were subsequently appointed assignees.

The defendants sued one Shepherd in the Boston Borough Court; the latter deposited with the sheriff the amount of the debt and 10*l.* for costs, under the 43 Geo. 3, c. 46, s. 2; the money was paid into court on the 13th September; on the 23rd, the plaintiffs in that action obtained the money under an order of the court, Shepherd having failed either to put in bail or to pay in an additional 10*l.* under the 7 & 8 Geo. 4, c. 71, s. 1; on the 28th a fiat issued against Shepherd, upon an act of bankruptcy committed on the 9th:—Held, that, notwithstanding the money was paid into court after the act of bankruptcy, the assignees of Shepherd could not recover it back; the creditors' right to it becoming complete on the debtor's failure to observe the conditions upon which he would have been entitled either to withdraw the money or to retain it in court to abide the event of the suit, and the payment having been made under the order of a court of competent jurisdiction.

1838.

REYNOLDS v. WEDD.

On the part of the plaintiff it was contended, on the authority of *Balme* v. *Hutton*, 3 M. & Scott, 1, 9 Bing. 471, 1 C. & M. 262, 2 Tyr. 620, and *Garland* v. *Carlisle*, 4 M. & Scott, 24, 2 C. & M. 31, 3 Tyr. 705, that the money in question, at the time it was paid over to the present defendants, was (by relation) the property of the plaintiffs as assignees of Shepherd.

On the other hand, it was insisted, upon the authority of *Foster* v. *Allanson*, 2 T. R. 479, *Philips* v. *Hunter*, 2 H. Blac. 402, and *Belcher* v. *Mills*, 2 C. M. & R. 150, that, the money having been paid under process of law, the assignees could not recover it back; and also, on the authority of *Cox* v. *Morgan*, 2 B. & P. 398, that, if considered as a payment to a creditor under an arrest, it was a protected payment within the bankrupt law, though made after a secret act of bankruptcy.

A nonsuit was entered under the direction of the learned judge, leave being reserved to the plaintiffs to move to set it aside, and enter a verdict for the sum claimed.

Balguy, in Easter term last, accordingly obtained a rule nisi—relying on *Balme* v. *Hutton* and *Garland* v. *Carlisle*, and also on *Ferrall* v. *Alexander*, 1 Dowl. 132, where it was held that money paid into court to abide the event of the suit under the 7 & 8 Geo. 4, c. 71, s. 2, is not a payment to a creditor within the protection of the 6 Geo. 4, c. 16, s. 82; and, if paid in *after* an act of bankruptcy, and within two months of the issuing of a commission, is not within the protection of the 81st section.

Wilde, Serjeant, *Humfrey*, and *Waddington*, shewed cause.—The money in question was paid into court under the statute, to abide the event of the suit in the Borough court. The defendant in that suit having neglected to take either that step which would have entitled him to withdraw it, or that which would have prevented the then

1838.

REYNOLDS v. WEDD.

plaintiff from obtaining it until the proper termination of the suit, the court had no power to refuse to pay it over to the latter — *Hannah* v. *Willis*, 5 Scott, 731, 4 New Cases, 310. It would be hard indeed if it were otherwise; seeing that the statute deprives the plaintiff of the remedy he otherwise would have against the bail. There is no legal principle more firmly established than that the propriety of a payment made under process of law cannot be re-tried in a subsequent suit to recover it back—*Prin* v. *Beale*, 3 Keble, 231; *Andrews* v. *Spicer*, 3 Keble, 616; *Pim* v. *Benson*, Freeman, 349; *Foster* v. *Allanson*, 2 T. R. 479; *Calvert* v. *Lingard*, cited in *Bradley* v. *Clarke*, 5 T. R. 200; *Holmes* v. *Wennington*, also cited in *Bradley* v. *Clarke*, and in *Cox* v. *Morgan*, 2 B. & P. 399, n.; *Marriott* v. *Hampton*, 7 T. R. 269; *Philips* v. *Hunter*, 2 H. Blac. 402; *Belcher* v. *Mills*, 2 C. M. & R. 150. The last-cited case is decisive of the question. There, A., on being arrested, gave a bail-bond to the sheriff, but did not perfect bail, whereby the sheriff became fixed; proceedings having been taken on the bail-bond, a judge at chambers made an order (on the application of the bail) that the proceedings should be stayed on payment of debt and costs, which were accordingly paid by A.'s attornies on the 27th of October; A. having deposited with his attornies on the 10th of October a sum of money towards payment of the debt and costs, and having become bankrupt on the 14th: it was held that this was a payment under process of law, and that the assignees of A. had no right to recover the money back from the party to whom it was paid. Parke, B., there says: "This money was recovered by legal proceedings against the plaintiff, and by due process of law, and cannot be recovered back again. It was recovered by a proceeding in invitum. It would be a great hardship on the defendants if they should be obliged to pay back this money when they have lost their remedy against the sheriff. It is a thing which

1838.

REYNOLDS v. WEBB.

cannot be allowed, that money which has been recovered by due course of law should be recovered back again in an action." In *Ferrall* v. *Alexander*, 1 Dowl. 132, neither party was in strictness entitled to take the money out of court; here, the defendant's right was complete before the issuing of the fiat against Shepherd: the two cases therefore are clearly distinguishable.

Balguy, *Talfourd*, Serjeant, and *N. R. Clarke*, in support of the rule.—The general principle that money recovered under the process of a court of competent jurisdiction cannot be recovered back as between the same parties, is not disputed. But it is an equally sound and incontrovertible rule of law that all the property of a bankrupt vests in his assignees by relation to the act of bankruptcy.—*Balme* v. *Hutton*; *Garland* v. *Carlisle*: and the question is whether this case falls within that general rule, or within the exception. At the time the money was paid into the Boston Court (the 13th September), it was clearly the property of the assignees; Shepherd, the debtor, having committed an act of bankruptcy on the 9th. In *Hannah* v. *Willis*, the question arose between the immediate parties; and there was no bankruptcy. The decision of the Boston Court—seeing that they were acting under a mistake—cannot be held conclusive as to the question of property. Suppose a payment of a debt to an executor, whose appointment by some means becomes vacated ab initio; could not the new representative maintain an action for the debt? [*Vaughan*.—In *Allan* v. *Dundas*, 3 T. R. 521, it was held that a payment of money to an executor who has obtained probate of a forged will, is a discharge to the debtor of the intestate, notwithstanding the probate be afterwards declared null, and administration be granted to the testator's next of kin.] *Ferrall* v. *Alexander* is a strong authority to shew that the money in question was improperly paid over to the present defendants. Here, as was urged

1838.

REYNOLDS v. WEDD.

in that case—"the money was paid into court after an act of bankruptcy; and therefore, as a commission issued within two months after the payment, it is not protected by section 81 of the 6 Geo. 4, c. 16; nor can it be considered as a payment to a creditor, so as to be protected by section 82 of that act." In reference to that argument, Littledale, J., in that case, says: "I think it cannot be considered as a payment to a creditor; and, as a commission issued within two months after the transaction, the plaintiff cannot avail himself of section 81. The plaintiff [who stood in the situation in which the present defendants stand here], is not entitled to have this money out of court." [*Coltman*, J.—In that case the application for the payment of the money out of court was made after verdict and before judgment; consequently, no default had committed, and the plaintiff's right had not accrued.] *Belcher* v. *Mills* is clearly distinguishable. There, as Parke, B., observes, the money was recovered by a proceeding in invitum: here, it was not so; the money was paid out to the defendants at their own mere instance, they giving up nothing. Besides, there, the plaintiffs would have a remedy against the attorneys, who paid over the money after the bankruptcy; here, the parties are without remedy. [*Vaughan*, J.—When the money is paid into court, does not the plaintiff in the suit acquire an inchoate right to it, which becomes choate and absolute upon the defendant's failure to comply with certain conditions?] The payment is by way of security only.

TINDAL, C. J.—I agree that this case is to be considered on the footing upon which it has been placed by my Brother Talfourd, viz. whether it falls within the general rule as to payments affected by relation to an act of bankruptcy, or within the exception as to payments made under the authority of a court of law. And, upon the best consideration I am able to bring to this case, it appears to me

1838.

REYNOLDS v. WEDD.

to fall within the exception. The short facts are these:—On the 9th September, 1837, Shepherd, the defendant in the court below, committed an act of bankruptcy; on the 13th, Shepherd having previously, in lieu of giving bail to a writ against him at the suit of the defendants in an action in the Boston Borough Court, paid into the hands of the officer 408*l.*, the amount of the debt, and 10*l.* for costs, under the 43 Geo. 3, c. 46, s. 2: the sum so deposited with the officer in lieu of bail was paid into court. But, Shepherd having made default in one of the requisites of the statute, viz. putting in and perfecting special bail, or paying into court an additional sum of 10*l.* to abide the event of the suit, under the 7 & 8 Geo. 4, c. 71, s. 1, the plaintiffs below, the present defendants, on the 23rd September, obtained an order for the payment out of court to them of the 408*l.* and 10*l.* On the 28th, a fiat issued against the defendant below upon the before-mentioned act of bankruptcy. It seems to me that the money so paid over to the defendants was paid under the authority of a court exercising a statutory power over the subject-matter, and having no authority under the statute to do otherwise than they did. The 43 Geo. 3, c. 46, s. 2, provides, that, where money has been deposited with the sheriff in lieu of giving a bail-bond, and by him paid into court, and the defendant shall duly put in and perfect bail in the action, the money so deposited and paid into court shall on motion be repaid to him; "but, in case the defendant shall not duly put in and perfect bail in such action, the money so deposited and paid into court, shall, by order of the court, upon a like motion to be made for that purpose, be paid over to the plaintiff in such action." At the time the order was so obtained, there was no person besides the defendants who was entitled to make the application to the court: Shepherd had become bankrupt; but no fiat had issued against him, and it could not then be known that a fiat ever would issue. We have already decided, in the late case of

Hannah v. *Willis*, 5 Scott, 731, 4 New Cases, 310, that, "Where no bail are put in within the proper time, the right of the plaintiff must necessarily attach as soon as the time for that act has passed, since no time for duly perfecting bail can be predicated of bail which have never been put in"; and that, "after the plaintiff, who is not in fault, has actually received the money under the authority of a rule of court regularly made in consequence of a default on the part of the defendant, we think the court ought not to interfere." In the present case it is also to be observed that by the course the cause has taken the plaintiffs in the court below have lost all remedy they would under other circumstances have had against the sheriff or the bail. I think, the money having been paid under the authority of a court of justice, pursuing the directions of a statute which gives them no discretion to withhold it, the assignees are not entitled to recover it back.

The case of *Ferrall* v. *Alexander*, 1 Dowl. 132, which has been much relied on on the part of the plaintiffs, may very well be distinguished from the present. There, at the time of the application, neither the plaintiff nor the defendants had any *right* to apply to have the money paid out of court; it was after verdict, and before judgment; and there had been no default: the plaintiff therefore had no right to apply to the court; the defendants, who had paid in the money, had become bankrupts before the money was paid in; a commission had afterwards issued against them, and assignees had been chosen. Matters so standing, Littledale, J., says: "The assignees put their claim on this ground, namely, that the money was paid into court after an act of bankruptcy, and therefore, as a commission issued within two months after the payment, it is not protected by s. 81 of the 6 Geo. 4, c. 16; nor can it be considered as a payment to a creditor, so as to be protected by s. 82 of that act. I think it cannot be considered as a payment to a creditor; and, as a commission issued within two months after the transaction, the plaintiff can-

1838.

REYNOLDS v. WEDD.

not avail himself of s. 81. The plaintiff, then, is not entitled to have this money out of court, nor are the assignees entitled to have it out under s. 3 of the 7 & 8 Geo. 4, c. 71. But the money is in court. If the court sees clearly, that, under the 6 Geo. 4, c. 16, s. 63, the assignees are entitled to this money, it may exercise its equitable discretion, and order it to be paid over to the assignees." The present case being thus clearly distinguishable from *Perrall* v. *Alexander*, I think it falls within the principle of *Belcher* v. *Mills*, 2 C. M. & R. 150, which is, indeed, a much stronger case than this. There, A. on being arrested gave a bail-bond to the sheriff, but did not perfect bail, by which the sheriff became fixed. Proceedings having been taken on the bail-bond, a judge at chambers made an order, on an application by the bail, that proceedings should be stayed on payment of debt and costs, which were accordingly paid by A.'s attornies on the 27th October. A. had supplied his attornies with a sum of money towards the payment of the debt and costs on the 10th October, and on the 14th he became bankrupt, and it was held, that, this being a payment under process of law, the assignees of A. had no right to recover back the money from the party to whom it was paid. Parke, B., there says: "This money was recovered by legal proceedings against the bankrupt, and by due process of law, and cannot be recovered back again. It was recovered by a proceeding in invitum. It would be a great hardship on the defendants if they should be obliged to pay back this money when they have lost their remedy against the sheriff. It is a thing which cannot be allowed, that money which has been recovered by due course of law should be recovered back again in an action." I am not disposed to question the authority of that case. The rule must be discharged.

PARK, J.—This is a case of considerable importance. I was of opinion at the trial, and I still think, that the

1838.

REYNOLDS v. WEBB.

plaintiffs are not entitled to recover this money: and it seems to me that this is borne out by the principle laid down by Lord Kenyon and the rest of the court in *Marriott* v. *Hampton*, viz. that, "after a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person." Under the provisions of this statute, where money has been paid into court in lieu of bail, the defendant may get it back on putting in and perfecting special bail; or, upon the defendant's failing so to do, or to pay in an additional 10*l.* under the 7 & 8 Geo. 4, c. 71, the plaintiff in the action is entitled to have the money paid out to him on motion. Here the money was paid into court before any act of bankruptcy was known to have been committed, and the defendant has not put in bail, nor has he availed himself of the other alternative given by the 7 & 8 Geo. 4, c. 71. Suppose, instead of being paid into court, this money had been paid over to the plaintiffs in the court below; would not that have been protected as a payment by compulsion of law? And is this payment under the order of a court of competent jurisdiction less a payment by compulsion of law? *Belcher* v. *Mills* is a much stronger case than this: there the money was paid over to the parties after the issuing of the fiat; here, the fiat did not issue until after the money had been paid out of court to the plaintiffs in the action. It seems to me that the utility of the act would be much impaired if we were to hold the defendants not entitled to retain the money.

VAUGHAN, J.—I am also of opinion that the plaintiffs in this case were properly nonsuited. The general proposition, that, where a trader commits an act of bankruptcy that is followed by a fiat, all his property vests in his assignees by relation to the act of bankruptcy, is not disputed. But the question is whether this does not fall within the exception as to payments made under the

1838.

REYNOLDS v. WEDD.

compulsory process of a court of competent jurisdiction. I am not prepared to say that this can be considered as a payment to a creditor within the 82nd section of the 6 Geo. 4, c. 16: but it is perfectly clear, that, if the money, instead of being paid into court, had been paid on the arrest to the plaintiffs in the Boston Court, it would have been a payment protected by that statute. The defendants became entitled to the money upon the failure of Shepherd to comply with the conditions of the statute under which it was paid into court; and the court had no power to withhold it from him. This therefore was clearly a payment to the defendants under process of law. *Belcher* v. *Mills* is a much stronger case than this: there, the fiat had actually issued before the money was paid, and yet it was held that it could not be recovered back. Independently, therefore, of the case of *Marriott* v. *Hampton*, and the judgment of Eyre, C. J., in *Philips* v. *Hunter*, 2 Hen. Blac. 402, which is exceedingly strong, I am of opinion that the nonsuit was right. The Boston Court have adjudicated upon a matter within their jurisdiction, and their adjudication is conclusive.

COLTMAN, J.—I think it is impossible to distinguish the present case from *Belcher* v. *Mills*, upon the authority of which I agree with the rest of the court in holding that the rule for setting aside this nonsuit must be discharged.

Rule discharged.

END OF TRINITY TERM.

IN THE COMMON PLEAS.

MICHAELMAS TERM, 2 VICTORIÆ.

THE JUDGES WHO SAT IN BANC DURING THIS TERM WERE— TINDAL, C. J., VAUGHAN, J., BOSANQUET, J., AND COLTMAN, J.

Regulæ Generales. 1838.

Admission of attornies.

WHEREAS it is provided by the act of 1 & 2 Vict., c. 45, s. 3, that, after the 1st November, 1838, any person entitled to be admitted an attorney of any of the superior courts of common law at Westminster, shall, after being sworn in and admitted as an attorney of any one of the said courts, be entitled to practise in any other of the said courts, upon signing the roll of such court (1), and not otherwise, in like manner as if he had been sworn in and admitted an attorney of such court; provided that no additional fee besides those payable under an act of 1 Vict., c. 56, shall be demanded or paid; and that the fees payable for such admissions shall be apportioned in such manner as the judges of the said courts, or any eight of them, shall by any rule or order made in term or vacation direct and appoint:

Fees payable for judge's fiat, how distributed

We therefore direct and appoint that the fees payable by virtue of the said last-mentioned act for the judge's

(1) In the Common Pleas the roll is signed at the Masters' office: in the Queens Bench and Exchequer it is signed in court.

1838.

Reg. Gen.

fiat, be received in the first instance by the clerk of the judge granting the fiat, and paid over by him to the clerk of the Chief Justice or Chief Baron of the court, as the case may be; and, the day after each term, all the fees so received shall be divided into fifteen portions, one of which shall be paid to the clerk or clerks of each judge; and, further, that the fees payable by virtue of the said act to the ushers, shall be received in the first instance by one of the ushers of the court in which the admission shall take place, and shall, on the day after each term, be divided into three equal portions, one of which shall be paid to the ushers of each court.

Denman.	J. Parke.	J. Williams.
N. C. Tindal.	J. B. Bosanquet	J. T. Coleridge.
Abinger.	E. H. Alderson.	T. Coltman.
J. Littledale.	J. Patteson.	T. Erskine.
J. Vaughan.	J. Gurney.	

Wednesday, May 30th.

Franks *v.* Price and Others.

Testator devised lands in moieties to his two daughters

THE following case was, by order of his Honour, the Master of the Rolls, stated for the opinion of this court:—

Judith and Rachael for life, with remainders and cross remainders to the issue of Rachael, and, in default of such issue, to his three sisters for their lives and the life of the survivor; and, after the decease of his daughters, and of the issue of Rachael, and of his three sisters, to his nephews Moses and Napthali for life, and to the survivor of them; and, if Moses should (after the deaths of Judith and Rachael, the children of Rachael, and the testator's three sisters) die before Napthali, leaving issue male, the testator devised one moiety to the use of the first and every other son and sons of Moses severally and successively in tail male, and, in default of such issue, to Napthali for life, and, after his decease, to his first and other sons severally and successively in tail male, and, in default of such issue to testator's right heirs; and if Napthali should (after the deaths of Judith and Rachael, the children of Rachael, and the testator's three sisters) die before Moses, leaving issue male, the testator devised one moiety to the use of the first and every other son and sons of Napthali severally and successively in tail male, and, in default of such issue, to Moses for life, and, after his decease, to his first and other sons severally and successively in tail male, and, in default of such issue, to the testator's right heirs: and, in case Moses and Napthali should both die without leaving any issue male, or such issue male should die without leaving any issue male, to the use of such person or persons as should at the death of the survivor of them the said Moses and Napthali be the testator's right heir or heirs. The testator's daughter Rachael, his three sisters, and Moses, all died in the lifetime of Judith; Rachael and Moses never having had any issue:—Held, that Napthali, upon the death of Moses without issue, became seised of a vested estate tail in remainder (expectant on the determination of the estates limited to Judith and Rachael and the testator's three sisters) in the whole of the property.

1838.

FRANKS v. PRICE.

Will of Moses Hart.

Moses Hart, being seised in fee of certain messuages, lands, and hereditaments at Topsfield, in the county of Essex, by his will, dated the 20th April, 1756, and duly executed and attested, gave, devised, and bequeathed his said messuages, lands, and hereditaments at Topsfield, in Essex, to trustees and their heirs, in trust, as to one moiety of the premises, for his daughter Judith Levy, for life, and, as to the other moiety, for his daughter Rachael Adolphus, for life, with divers remainders and cross-remainders to the issue of Rachael Adolphus; and, for default of such issue, to the testator's three sisters for their life, and the life of the survivor; and, from and after the decease of his daughters, and of the issue of his daughter Rachael Adolphus, and the decease of his three sisters, to the use of Moses Hart and Napthali Hart, the sons of his brother-in-law Solomon Hart, for and during the term of their respective natural lives, share and share alike; and, in case either of them, the said Moses Hart and Napthali Hart, should depart this life without leaving issue male of his body lawfully begotten, then, as to the whole of his said estate, to the use of the survivor of them, during the term of his natural life: and, if Moses Hart should (after the deaths of Judith Levy and Rachael Adolphus, and of the children of the said Rachael Adolphus, if any, and the decease of the testator's three sisters) depart this life before Napthali Hart, leaving issue male of his body, then and in such case the testator devised one moiety of his estate to the use of the first and every other son and sons of Moses Hart severally and successively, in tail male; and, in default of such issue, to the use of Napthali Hart for the term of his natural life; and, after his decease, to the use of the first and other sons of Napthali Hart severally and successively, in tail male; and, in default of such issue, to the use of the testator's right heirs: and, if Napthali Hart should (after the death of Judith Levi and Rachael

1838.

FRANKS v. PRICE.

Adolphus, and the children of the said Rachael Adolphus, if any, and the decease of the testator's three sisters,) depart this life before Moses Hart, leaving issue male of his body lawfully begotten, then and in such case the testator devised one moiety of his said estate to the use of the first and every other son and sons of Napthali Hart severally and successively, in tail male; and, in default of such issue, to the use of Moses Hart for the term of his natural life; and, after his decease, to the use of his first and other sons severally and successively, in tail male; and, in default of such issue, to the use of the testator's right heirs: and, in case Moses Hart and Napthali Hart should both die without leaving any issue male, or such issue male should die without leaving any issue male, then, and in such case, the testator devised his said estate to the use of such person or persons as should at the death of the survivor of them the said Moses Hart and Napthali Hart be his, the testator's, right heir or heirs.

Death of the testator.

The testator, Moses Hart, died without having revoked or altered his said will.

His heirs at law.

The heirs at law of the said testator living at the time of his death, were, his said two daughters Judith Levy and Rachael Adolphus, his grandson Henry Isaac Franks, and his two grand-daughters Philah Franks and Priscilla Franks—Henry Isaac Franks being the only son of Frances Franks, a deceased daughter of the testator who married Isaac Franks—and Philah Franks and Priscilla Franks being the only children of Philah Franks, late wife of Aaron Franks, another daughter of the testator, who also died in his lifetime.

On the death of the testator, Moses Hart, Judith Levy and Rachael Adolphus, by virtue of the will, entered into possession of the said messuages, lands, hereditaments and premises at Topsfield, and received the rents thereof in equal moieties until the death of the said Rachael Adolphus in the year 1773 without issue, whereupon

1838.

FRANKS v. PRICE.

Judith Levy took possession of Rachael Adolphus's said moiety of the estate, and received the rents of the whole of the estate from that time to the time of her death.

The devisee Moses Hart and the testator's said three sisters survived the testator, and all died in the lifetime of Judith Levy; and the devisee Moses Hart died without having had any issue.

Death of the devisee Moses Hart.

The said Judith Levy died in the month of January, 1803; and thereupon Napthali Hart entered into possession of the said estate, and in Hilary Term, 1821, suffered a common recovery thereof to the use of Stratford Price, his heirs and assigns; and the estate was held, and the rents thereof were taken accordingly, until about the month of March, 1830, when a receiver was appointed of the same by the court of Chancery, who is now in possession of the estate.

Death of Judith Levy.

The said Henry Isaac Franks died in the lifetime of Napthali Hart without having been married, leaving Jacob Henry Franks, the only son of Philah Franks, the wife of A. Franks, his heir-at-law.

Death of Henry Isaac Franks.

Philah Franks, sister of the said Priscilla Franks, married Moses Franks, and also died in the lifetime of Napthali Hart, leaving Dame Isabella Bell Cooper, the widow of Sir William Henry Cooper, Bart., her only child and heir-at-law.

Death of Philah Franks.

On the 28th December, 1828, Napthali Hart died without having had any issue: and the heirs-at-law of the testator living at the time of the death of Napthali Hart, were, the said Jacob Henry Franks, Priscilla Franks, and Dame Isabella Bell Cooper.

Death of Napthali Hart.

The questions for the opinion of the court were—first, whether Napthali Hart took any and what estate in the messuages, lands, and hereditaments at Topsfield under the testator's will—secondly, whether Jacob Henry Franks, Priscilla Franks, and Dame Isabella Bell Cooper, the heirs-at-law of the testator living at the time of the death

Questions.

1838.

FRANKS v. PRICE.

Adolphus, and the children of the said Rachael Adolphus, if any, and the decease of the testator's three sisters,) depart this life before Moses Hart, leaving issue male of his body lawfully begotten, then and in such case the testator devised one moiety of his said estate to the use of the first and every other son and sons of Napthali Hart severally and successively, in tail male; and, in default of such issue, to the use of Moses Hart for the term of his natural life; and, after his decease, to the use of his first and other sons severally and successively, in tail male; and, in default of such issue, to the use of the testator's right heirs: and, in case Moses Hart and Napthali Hart should both die without leaving any issue male, or such issue male should die without leaving any issue male, then, and in such case, the testator devised his said estate to the use of such person or persons as should at the death of the survivor of them the said Moses Hart and Napthali Hart be his, the testator's, right heir or heirs.

Death of the testator.

The testator, Moses Hart, died without having revoked or altered his said will.

His heirs at law.

The heirs at law of the said testator living at the time of his death, were, his said two daughters Judith Levy and Rachael Adolphus, his grandson Henry Isaac Franks, and his two grand-daughters Philah Franks and Priscilla Franks—Henry Isaac Franks being the only son of Frances Franks, a deceased daughter of the testator who married Isaac Franks—and Philah Franks and Priscilla Franks being the only children of Philah Franks, the wife of Aaron Franks, another daughter of the testator, who also died in his lifetime.

On the death of the testator, Moses Hart, Judith Levy and Rachael Adolphus, by virtue of the will, entered into possession of the said messuages, lands, hereditaments, and premises at Topsfield, and received the rents thereof in equal moieties until the death of the said Rachael Adolphus in the year 1773 without issue, whereupon

1838.

FRANKS v. PRICE.

Judith Levy took possession of Rachael Adolphus's said moiety of the estate, and received the rents of the whole of the estate from that time to the time of her death.

Death of the devisee Moses Hart.

The devisee Moses Hart and the testator's said three sisters survived the testator, and all died in the lifetime of Judith Levy; and the devisee Moses Hart died without having had any issue.

Death of Judith Levy.

The said Judith Levy died in the month of January, 1803; and thereupon Napthali Hart entered into possession of the said estate, and in Hilary Term, 1821, suffered a common recovery thereof to the use of Stratford Price, his heirs and assigns; and the estate was held, and the rents thereof were taken accordingly, until about the month of March, 1830, when a receiver was appointed of the same by the court of Chancery, who is now in possession of the estate.

Death of Henry Isaac Franks.

The said Henry Isaac Franks died in the lifetime of Napthali Hart without having been married, leaving Jacob Henry Franks, the only son of Philah Franks, the wife of A. Franks, his heir-at-law.

Death of Philah Franks.

Philah Franks, sister of the said Priscilla Franks, married Moses Franks, and also died in the lifetime of Napthali Hart, leaving Dame Isabella Bell Cooper, the widow of Sir William Henry Cooper, Bart., her only child and heir-at-law.

Death of Napthali Hart.

On the 28th December, 1828, Napthali Hart died without having had any issue: and the heirs-at-law of the testator living at the time of the death of Napthali Hart, were, the said Jacob Henry Franks, Priscilla Franks, and Dame Isabella Bell Cooper.

Questions.

The questions for the opinion of the court were—first, whether Napthali Hart took any and what estate in the messuages, lands, and hereditaments at Topsfield under the testator's will—secondly, whether Jacob Henry Franks, Priscilla Franks, and Dame Isabella Bell Cooper, the heirs-at-law of the testator living at the time of the death

1838.

FRANKS v. PRICE.

of Napthali Hart, took any and what estate in the messuages, lands, and hereditaments at Topsfield, under the said will—thirdly, whether Judith Levy, Rachael Adolphus, Henry Isaac Franks, Philah Franks, and Priscilla Franks, the heirs-at-law of the testator living at the time of his death, took any and what estate in the said messuages, lands, and hereditaments at Topsfield.

Right to begin, where affirmative on the defendant.

Wilde, Serjeant, for the defendants, submitted that, inasmuch as it lay upon him to shew affirmatively that Napthali Hart took an estate tail under the will of Moses Hart, he was entitled to begin.

Stephen, Serjeant, contrà, observed that he also had to maintain an affirmative, viz. that Napthali Hart took a life estate, and that, representing the plaintiff, it was for him to commence.

TINDAL, C. J.—The good sense of the thing certainly seems to be that the party claiming affirmatively the larger estate should be the first heard: but, in the absence of any clear rule upon the subject, the *plaintiff* must begin.

Stephen, Serjeant (*Talfourd*, Serjeant, was with him); for the plaintiff.—The interests of the parties only require that the court should certify as to the first question, viz. whether Napthali Hart took under the will in question an estate tail or for life only, and whether in more than a moiety. On the part of the plaintiff it is contended that Napthali Hart took (if he took any thing) a life estate only, and consequently that the recovery suffered by him in 1821 was ineffectual to bar the remainders. In the event that has happened, of Moses and Napthali Hart both dying without leaving issue male, Jacob Henry Franks, Priscilla Franks, and Isabella Bell Cooper, the heirs-at-law of the testator, took under the ultimate re-

1838.

Beards v. Price.

mainder an estate in fee by purchase. The precise interest taken by Napthali Hart under the will was this—an estate for life in a moiety of the property, with remainder to his issue male, remainder over to the three persons above named; and, as to the other moiety, he took, on the death of his brother Moses, an estate for life, remainder to his issue male, remainder over to the same parties. Neither Moses nor Napthali were to take any thing unless in the event of their surviving all the preceding devisees, viz. Judith Levy, Rachael Adolphus, and the testator's three sisters. It appears from the case that Moses died before Judith; consequently, the contingency upon which he was to take a moiety never happened. It is unnecessary to suggest a motive for a devise, where the terms of it are, as these are, clear and unambiguous. In Powell on Devises, 3rd edit., by Jarman, Vol. 2, p. 224, it is said that "devises limited in clear and express terms of contingency do not take effect unless the events upon which they are made dependent happen." In *Denn* d. *Radclyffe* v. *Bagshaw*, 6 T. R. 512, which approaches very nearly to the present case, the testator devised to Margaret (an only child) for life, remainder to the first son of her body, "if living at the time of her death," and the heirs male of such son, and, for default of such issue, to the second son of her body, "if living at the time of her death," and the heirs male of such second son, &c.; and, for default of such issue male, remainder to A.: Margaret had one son, who died in her lifetime, leaving a son: and it was held that Margaret only took an estate for life, and that neither her son or grandson took any estate, but that the remainder to A. took effect. The doctrine of that case was recognised in *Holmes* v. *Cradock*, 3 Ves. 317. The principle of construction laid down in *Driver* d. *Frank* v. *Frank*, 3 M. & S. 512, is that which will govern this case. In *Davis* d. *Pierce* v. *Norton*, 2 P. Wms. 390, the contingency was of precisely the same nature as that in the

1838.

FRANKS v. PRICE.

present case. There, A., seised in fee, had a son B. and a sister C., &c., and devised his lands to his son B. in tail general, and, if his son B. should die without issue, and his wife should survive him, then the wife to have the premises for life, remainder to C. in fee: B., the son, died without issue, but the testator's wife died before him: and it was held that C. was not entitled to the remainder in fee, because the contingency was annexed to all the devises over.

But, assuming this not to be a devise to Moses and to Napthali Hart upon a contingency, the question arises, whether Napthali Hart took an estate tail, or whether Moses and Napthali took estates for life in their respective moieties, remainder to the sons in tail as purchasers, with cross-remainders between the families, and remainder over to the right heirs of the testator. There are certain contingencies for which the testator has omitted to provide. The events upon which estates tail are limited, are—first, Moses dying in the lifetime of Napthali, leaving issue male; in which case the limitation is to the first and every other son of Moses severally and successively in tail male, remainder to Napthali for life, remainder to his sons in tail: this would not give Napthali an estate tail—secondly, Napthali dying in the lifetime of Moses, leaving issue male; in which case the limitation is in like manner, to the first and every other son of Napthali severally and successively in tail male, remainder to Moses for life, remainder to his sons in tail. The limitations are inartificially and imperfectly expressed: the design of the testator evidently was in *every* event to give only estates for life to Moses and Napthali in their several moieties, remainder to the issue male of each in tail, with cross-remainders over for life and in tail. A court of justice may construe a will; and, from what is expressed, necessarily *imply* an intent not particularly specified in words—Per Lord Mansfield, in *Chapman* d. *Oliver* v. *Brown*, 3 Burr. 1634. The doc-

trine that will be contended for on the other side is inapplicable here, for two reasons—first, because the testator did not contemplate an indefinite failure of issue, but a failure of issue at the death of the survivor of Moses and Napthali; and therefore an estate tail cannot be implied —*Harman* v. *Dickinson*, 1 Bro. C. C. 91, 2 Madd. 449; *Burnaby* v. *Griffin*, 3 Ves. 266; *Lethieullier* v. *Tracy*, 3 Atk. 774; *Pells* v. *Brown*, Cro. Jac. 590; *Doe* d. *Bean* v. *Halley*, 8 T. R. 5; *Doe* d. *Barnfield* v. *Wetton*, 2 B. & P. 324; *Doe* d. *King* v. *Frost*, 3 B. & A. 546—Secondly, because the words denoting a failure of issue here have reference to antecedent objects, in which case also there can be no implication of an estate tail—*Doe* d. *Barnard* v. *Reason*, cited 3 Wilson, 244; *Bamfield* v. *Popham*, 1 Eq. Cas. Abr. 183, 2 Vern. 427, 449, 1 P. Wms. 54; *Goodright* d. *Docking* v. *Dunham*, Doug. 264; *Ginger* d. *White* v. *White*, Willes, 348; *Blackborn* v. *Edgley*, 1 P. Wms. 600; *Morse* v. *Lord Ormonde*, 5 Madd. 99; 2 Pow. Dev. by Jarman, 3rd edit. 551.

Wilde, Serjeant, for the defendants.—The true construction of this will, taking the whole of it together, appears to be this—Napthali, in the events that have happened, took an estate for life, remainder to his issue in tail (by purchase), with a limitation in remainder to Napthali in tail—the devise over on failure of issue of Moses and Napthali, meaning an indefinite failure of issue, which by implication of law creates an estate tail. The limitations in the first part of the will are of moieties severally; the devise over deals with the entirety: consequently, the ultimate limitation over has reference to a different estate from that first mentioned. The estate was not to go over so long as there existed issue male of either of the two nephews of the testator. In *The Attorney-General* v. *Sutton*, 1 P. Wms. 753, a devise to A. for life, remainder to his first and second sons in tail male, and,

1838.

FRANKS v. PRICE.

after A.'s death without issue male then over, was held to give A. an estate tail. From that time to the present the decisions have been uniform. *Langley* v. *Baldwin*, 1 Eq. Cas. Abr. 185, pl. 29, *Atkinson* v. *Clitherow*, 1 Ves. sen. 24, and *Doe* d. *Bean* v. *Halley*, 8 T. R. 5, are authorities to the same effect. In *Parr* v. *Swindels*, 4 Russ. 283, a gift of real estate to A. for life, with remainder to her children as tenants in common, and, in case A. shall die without leaving lawful issue, then remainder over, was held to be a gift to A. for life, with remainder to her children for life, with remainder to A. in tail. That case is precisely in point. *Webb* v. *Hearing*, Cro. Jac. 415, *Doe* d. *Plamer* v. *Scudamore*, 2 B. & P. 289, and *Earl of Scarborough* v. *Doe* d. *Savile*, 3 Ad. & E. 897, were also cited.

Stephen, Serjeant, having been heard in reply—

The following certificate was afterwards sent to the Master of the Rolls:—

Certificate.

"We are of opinion, that, upon the death of Moses Hart without issue, Napthali Hart became and was seised under and by virtue of the testator's will of a vested estate in tail male in remainder (expectant on the determination of the estates limited to Judith Levy, Rachael Adolphus, and her children, and the testator's three sisters,) in all the messuages, lands, and hereditaments at Topsfield.

"It having been intimated to us by the counsel on both sides, that, in the event of our opinion on the first question being such as is above stated, they do not desire to have our opinion on the matters referred to in the second and third questions, we forbear to say any thing in answer to them.

"N. C. TINDAL.
"J. A. PARK.
"J. VAUGHAN.
"T. COLTMAN."

1838.

THE DUKE OF GRAFTON *v.* THE LONDON AND BIRMINGHAM RAILWAY COMPANY.

THE following case was by order of the Master of the Rolls submitted for the opinion of this court:—

By letters patent, bearing date the 25th year of the reign of Charles the Second, his majesty, for and in consideration of the true and acceptable service very frequently performed by his well beloved and right trusty cousin and counsellor, Henry, Earl of Arlington, his principal secretary, and for divers other good causes and considerations him thereto especially moving, of his especial grace, and of his certain knowledge and mere motion, did give and grant unto the aforesaid Earl of Arlington, amongst other hereditaments, all that the honour of Grafton in the county of Northampton, and all that the lordship and manor of Grafton, and the manor of Hartwell, in the said county of Northampton, parcel of the honour of Grafton, with all and singular their rights, members, and appurtenances whatsoever, and also divers lands, tenements and hereditaments therein particularly described, situate, lying, and being in the parishes of Blisworth, Ashton, and Hartwell, in the county of Northampton, and elsewhere in the said county; allwhich property was described as having been theretofore granted to trustees for ninety-nine years, in trust for Queen Katharine if she should so long live: to hold to the said Earl of Arlington from and immediately after the determination of the estate of the trustees, for and during the term of the life of him, Lord Arlington, paying a yearly rent of 20*s*. And further the said king in consideration of the natural love and affection which he had and bore towards his most dear natural son, Henry Fitzroy, Earl of Euston, and for divers other good causes and considerations him thereunto especially moving, of his especial grace, certain knowledge, and mere motion, for

By letters patent, King Charles the Second, in the twenty-fifth year of his reign, in consideration of natural love and affection, granted an estate tail in certain lands to his illegitimate son H. F., afterwards created Duke of Grafton:—Held, that such estate, and all other estates tail and remainders and reversions thereupon expectant or depending, were effectually barred and extinguished by indentures of bargain and sale under the 3 & 4 Will. 4, c. 74, s. 15, notwithstanding the statute 34 & 35 Hen. 8, c. 20.

1839.

THE DUKE OF GRAFTON v. THE LONDON AND BIRMINGHAM RAILWAY CO.

himself, his heirs and successors, did give and grant the aforesaid honour, lordship, and manor of Grafton aforesaid, and all and singular other the manors, lands, tenements, hereditaments, rents, farms, office of feodary, coppices, woods, and underwoods, reversions, remainders, and other the premises aforesaid, and every part and parcel thereof; to have, hold, and enjoy the same, with all their and every of their rights, members, and appurtenances, to the aforesaid Henry Fitzroy, Earl of Euston, and the heirs male of his body lawfully begotten and to be begotten, immediately from and after the determination of the estate and interest of the aforesaid trustees of and in the said premises; and, from and after the death of the aforesaid Henry, Earl of Arlington, to the only proper use and behoof of the aforesaid Henry Fitzroy, Earl of Euston, and his heirs male for ever; rendering and paying therefore yearly to the said king, his heirs and successors, the yearly rent of 20*s.*; and, for default of such issue of the Earl of Euston, on the like considerations and the like rent, to the king's second natural son, Charles, Earl of Southampton, and the heirs male of his body issuing; and, for default of such issue, on the like considerations and the like rent, to the king's third natural son, Lord George Fitzroy, otherwise Palmer: And the said king, of his more abundant special grace, and of his certain knowledge and mere motion, did, for himself, his heirs and successors, declare and grant that the said letters patent, or the inrolment thereof, and all and every the gifts and grants in the same contained or specified, might and should be to the said Henry, Earl of Arlington, and, after his decease, to the said Henry, Earl of Euston, and the heirs male of his body lawfully begotten and to be begotten, and, for default of such issue, to the said Charles, Earl of Southampton, and the heirs male of his body lawfully begotten and to be begotten, and, for default of such issue, to Lord George Fitzroy, otherwise

1838.

THE DUKE OF GRAFTON v. THE LONDON AND BIRMINGHAM RAILWAY CO.

Palmer, and the heirs male of his body lawfully begotten or to be begotten, in and by all things good, valid, and effectual in law towards and against the said king, his heirs and successors, according to the true intent thereof; and should be accepted, construed, and interpreted in all his courts and elsewhere in the most beneficial, liberal, and favorable sense, for the benefit and advantage of the said Henry, Earl of Arlington, during his natural life, and, after his decease, for the benefit and advantage of the said Henry, Earl of Euston, and the heirs male of his body lawfully begotten and to be begotten, and, for default of such issue, for the benefit and advantage of Charles, Earl of Southampton, and the heirs male of his body lawfully begotten and to be begotten, and, for default of such issue, for the benefit and advantage of the said Lord George Fitzroy, otherwise Palmer, and the heirs male of his body lawfully begotten and to be begotten; and that without any confirmation, license, or toleration to be from the said king, his heirs or successors, in that behalf procured or obtained, notwithstanding the misnaming or not naming, misreciting or not reciting the aforesaid honor, lordship, manors, and other the premises by the now stating letters patent granted or mentioned to be granted, or any part or parcel thereof, &c.; and notwithstanding any other defects in not naming or mentioning, or not rightly naming or mentioning the natures, kinds, sorts, quantities, or qualities, metes, or bounds of the premises, or of any parcel thereof, or any person or persons who then were or theretofore had been seised of the premises, or of any parcel thereof; any statute, act, ordinance, proviso, thing or matter whatsoever to the contrary thereof in any wise notwithstanding.

The said Katherine, the wife of his said majesty, King Charles the Second, died in the life-time of Henry, Earl of Arlington.

Earl Euston born in 1663,

Henry Fitzroy, Earl of Euston, was born in the year

1839.

THE DUKE OF GRAFTON v. THE LONDON AND BIRMINGHAM RAILWAY CO.

himself, his heirs and successors, did give and grant the aforesaid honour, lordship, and manor of Grafton aforesaid, and all and singular other the manors, lands, tenements, hereditaments, rents, farms, office of feodary, coppices, woods, and underwoods, reversions, remainders, and other the premises aforesaid, and every part and parcel thereof; to have, hold, and enjoy the same, with all their and every of their rights, members, and appurtenances, to the aforesaid Henry Fitzroy, Earl of Euston, and the heirs male of his body lawfully begotten and to be begotten, immediately from and after the determination of the estate and interest of the aforesaid trustees of and in the said premises; and, from and after the death of the aforesaid Henry, Earl of Arlington, to the only proper use and behoof of the aforesaid Henry Fitzroy, Earl of Euston, and his heirs male for ever; rendering and paying therefore yearly to the said king, his heirs and successors, the yearly rent of *20s.;* and, for default of such issue of the Earl of Euston, on the like considerations and the like rent, to the king's second natural son, Charles, Earl of Southampton, and the heirs male of his body issuing; and, for default of such issue, on the like considerations and the like rent, to the king's third natural son, Lord George Fitzroy, otherwise Palmer: And the said king, of his more abundant special grace, and of his certain knowledge and mere motion, did, for himself, his heirs and successors, declare and grant that the said letters patent, or the inrolment thereof, and all and every the gifts and grants in the same contained or specified, might and should be to the said Henry, Earl of Arlington, and, after his decease, to the said Henry, Earl of Euston, and the heirs male of his body lawfully begotten and to be begotten, and, for default of such issue, to the said Charles, Earl of Southampton, and the heirs male of his body lawfully begotten and to be begotten, and, for default of such issue, to Lord George Fitzroy, otherwise

1838.

THE DUKE OF GRAFTON v. THE LONDON AND BIRMINGHAM RAILWAY CO.

Palmer, and the heirs male of his body lawfully begotten or to be begotten, in and by all things good, valid, and effectual in law towards and against the said king, his heirs and successors, according to the true intent thereof; and should be accepted, construed, and interpreted in all his courts and elsewhere in the most beneficial, liberal, and favorable sense, for the benefit and advantage of the said Henry, Earl of Arlington, during his natural life, and, after his decease, for the benefit and advantage of the said Henry, Earl of Euston, and the heirs male of his body lawfully begotten and to be begotten, and, for default of such issue, for the benefit and advantage of Charles, Earl of Southampton, and the heirs male of his body lawfully begotten and to be begotten, and, for default of such issue, for the benefit and advantage of the said Lord George Fitzroy, otherwise Palmer, and the heirs male of his body lawfully begotten and to be begotten; and that without any confirmation, license, or toleration to be from the said king, his heirs or successors, in that behalf procured or obtained, notwithstanding the misnaming or not naming, misreciting or not reciting the aforesaid honor, lordship, manors, and other the premises by the now stating letters patent granted or mentioned to be granted, or any part or parcel thereof, &c.; and notwithstanding any other defects in not naming or mentioning, or not rightly naming or mentioning the natures, kinds, sorts, quantities, or qualities, metes, or bounds of the premises, or of any parcel thereof, or any person or persons who then were or theretofore had been seised of the premises, or of any parcel thereof; any statute, act, ordinance, proviso, thing or matter whatsoever to the contrary thereof in any wise notwithstanding.

The said Katherine, the wife of his said majesty, King Charles the Second, died in the life-time of Henry, Earl of Arlington.

Earl Euston born in 1663,

Henry Fitzroy, Earl of Euston, was born in the year

1838.

FRANKS v. PRICE.

Adolphus, and the children of the said Rachael Adolphus, if any, and the decease of the testator's three sisters,) depart this life before Moses Hart, leaving issue male of his body lawfully begotten, then and in such case the testator devised one moiety of his said estate to the use of the first and every other son and sons of Napthali Hart severally and successively, in tail male; and, in default of such issue, to the use of Moses Hart for the term of his natural life; and, after his decease, to the use of his first and other sons severally and successively, in tail male; and, in default of such issue, to the use of the testator's right heirs: and, in case Moses Hart and Napthali Hart should both die without leaving any issue male, or such issue male should die without leaving any issue male, then, and in such case, the testator devised his said estate to the use of such person or persons as should at the death of the survivor of them the said Moses Hart and Napthali Hart be his, the testator's, right heir or heirs.

Death of the testator.

The testator, Moses Hart, died without having revoked or altered his said will.

His heirs at law.

The heirs at law of the said testator living at the time of his death, were, his said two daughters Judith Levy and Rachael Adolphus, his grandson Henry Isaac Franks, and his two grand-daughters Philah Franks and Priscilla Franks—Henry Isaac Franks being the only son of Frances Franks, a deceased daughter of the testator who married Isaac Franks—and Philah Franks and Priscilla Franks being the only children of Philah Franks, the wife of Aaron Franks, another daughter of the testator, who also died in his lifetime.

On the death of the testator, Moses Hart, Judith Levy and Rachael Adolphus, by virtue of the will, entered into possession of the said messuages, lands, hereditaments, and premises at Topsfield, and received the rents thereof in equal moieties until the death of the said Rachael Adolphus in the year 1773 without issue, whereupon

1838.

FRANKS v. PRICE.

Judith Levy took possession of Rachael Adolphus's said moiety of the estate, and received the rents of the whole of the estate from that time to the time of her death.

The devisee Moses Hart and the testator's said three sisters survived the testator, and all died in the lifetime of Judith Levy; and the devisee Moses Hart died without having had any issue.

Death of the devisee Moses Hart.

The said Judith Levy died in the month of January, 1803; and thereupon Napthali Hart entered into possession of the said estate, and in Hilary Term, 1821, suffered a common recovery thereof to the use of Stratford Price, his heirs and assigns; and the estate was held, and the rents thereof were taken accordingly, until about the month of March, 1830, when a receiver was appointed of the same by the court of Chancery, who is now in possession of the estate.

Death of Judith Levy.

The said Henry Isaac Franks died in the lifetime of Napthali Hart without having been married, leaving Jacob Henry Franks, the only son of Philah Franks, the wife of A. Franks, his heir-at-law.

Death of Henry Isaac Franks.

Philah Franks, sister of the said Priscilla Franks, married Moses Franks, and also died in the lifetime of Napthali Hart, leaving Dame Isabella Bell Cooper, the widow of Sir William Henry Cooper, Bart., her only child and heir-at-law.

Death of Philah Franks.

On the 28th December, 1828, Napthali Hart died without having had any issue: and the heirs-at-law of the testator living at the time of the death of Napthali Hart, were, the said Jacob Henry Franks, Priscilla Franks, and Dame Isabella Bell Cooper.

Death of Napthali Hart.

The questions for the opinion of the court were—first, whether Napthali Hart took any and what estate in the messuages, lands, and hereditaments at Topsfield under the testator's will—secondly, whether Jacob Henry Franks, Priscilla Franks, and Dame Isabella Bell Cooper, the heirs-at-law of the testator living at the time of the death

Questions.

1838.

FRANKS v. PRICE.

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1838.

FRANKS v. PRICE.

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Death of Napthali Hart.

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Questions.

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1838.

THE DUKE OF GRAFTON v. THE LONDON AND BIRMINGHAM RAILWAY CO.

could not be decreed (2). That doubt is removed by the late statute. The 34 & 35 Hen. 8, c. 20, applies only to grants that purport on the face of them to have been made for *services* only; a grant for any other consideration is not within the act—*Earl of Nottingham* v. *Lord Munson*, Dyer, 32. a., n. 1; *Perkins*, d. *Vowle* v. *Sewell*, 4 Burr. 2223, 1 W. Blac. 654 (3). Here, the grant of the prior estate to Lord Arlington being expressly declared to be made in consideration of services, it is but reasonable to infer, that, if services formed any part of the consideration of the grant to the earl of Euston, it would have been so stated. And, although the law does not recognise the relation of parent and child in the case of illegitimate children; yet, where natural love and affection is assigned as the consideration for a grant from a man to his natural offspring, the court will look for no further consideration: see *Filmer* v. *Gott*, 4 Bro. P. C. 270, and *Warry* v. *Warry*, 8 Bligh, 1.

In the present case, the age of the Earl at the time of the grant would preclude any implication of *services* ren-

(2) See Boyman v. Gutch, 5 M. & P. 222, 7 Bing. 379.

(3) In that case it was found by a special verdict, "that William Dexter, being seised in fee, enfeoffed Henry, Earl of Derby, afterwards King Henry the Fourth, and his heirs for ever; that Henry the Fourth, when king, by letters patent under the seal of the Duchy of Lancaster (reciting that Margaret, the grand-daughter and heir of William Dexter, had represented that Dexter was dead, and that the manor remained in the hands of the crown, and expressing that the king was willing to do that which law and equity, good faith, and good conscience required), granted the manor to one Mitton and the said Margaret his wife; to hold to the said Mitton and Margaret his wife, and the heirs of the said Margaret, of the Duchy of Lancaster; and, if the said Margaret should die without heirs, then to revert to the king and his heirs." The question whether this grant was within the protection of the 34 & 35 Hen. 8, c. 20—was twice argued; and the court held, "that the grant was neither a *gift* nor a *reward for services*, but made as an *act of justice*, in execution of some secret trust or confidence, and therefore not within either the preamble or the enacting clauses of that statute."

1838.

THE DUKE OF GRAFTON v. THE LONDON AND BIRMINGHAM RAILWAY CO.

dered, even if the court could infer such from the general words in the grant. Those words never have any value assigned to them; they are not sufficient to raise an use—*Mildmay's* Case, 1 Rep. 174. b.; *Wiseman's* Case, 2 Rep. 15; Viner's Abridgment, *Consideration*, (B). The statute being in restraint of alienation, and in support of the only perpetuity the law allows, should be construed strictly (4).

Channell, for the defendants.—There is doubtless much in Sir W. Blackstone's report of *Perkins* v. *Sewell*, to induce a conclusion, that, in order to bring a grant within the operation of the 34 & 35 Hen. 8, c. 20, it should on the face of it appear to have been made in consideration of *services*: but the point was not decided; the allusion to services was extra-judicial: Lord Mansfield says—"As for the *services* which are the consideration of such gift, these must at a distance of time be presumed, and need not be proved." And see Preston on Conveyancing, Vol. 1, pp. 145, 146. The first part of the preamble of the statute of Henry 8, applies to *all* gifts by the crown, whether already made or thereafter to be made—Co. Litt. 373. a. Suppose, instead of a grant from the crown, this had been the case of a bargain and sale which requires consideration, there can be no doubt but that, under the general words "other good causes and considerations," a consideration for money or money's worth might be shewn—*Fisher* v. *Smith*, F. Moore, 569. So, the court will be warranted in presuming the true consideration here to have been services rendered; for, otherwise, the grant is without consideration to support it, there being no case in which natural love and affection for an illegitimate child has been

(4) As to the effect of a recovery where the reversion or remainder was in the king, see Com. Dig. Estates (B. 31), Bac. Abr. Fines and Recoveries (second division), (C).

1868.

THE DUKE OF GRAFTON v. THE LONDON AND BIRMINGHAM RAILWAY CO.

held to be a good consideration. Passages inclining to the contrary doctrine will be found in Sheppard's Touchstone, 510, where it is said, that "if one (for divers good causes and considerations, or, for divers great and valuable considerations), bargain and sell his land to another, or covenant to stand seised of his land to the use of another *that is not of his kindred*, no use will rise by this, unless it be proved that money or something else was given for it." Services are so various that it is not impossible that some kind of service may have been performed even by a child of the age of ten years.

4 Hen. 4, c. 4.

By the 4 Hen. 4, c. 4, an act passed for the restraining of prodigal grants from the crown to undeserving persons, it was promised as follows:—"Item come devaunt ses heures plusours douns et grantes aient este faitz as diverses persones sibien des revenues du droit de la corone d'Engleterre come les gardes mariages terres et tenementz et autres diverses commoditees sanz bone deliberation ent eue sicome les ditz communes ont monstrez a nostre dit seignur le Roy en parlement mesme nostre seignur le Roy ent veullant purvoir de remede ad declarrez qe son entent est de soy abstenir de faire aucuns tielx douns ou grantes sinon a ceux persones qe le deservont et come meults y semblera a Roy et son conseil. Et depuis qil est le desire de toutz les estats du roialme qe riens soit ensy demande de mesme nostre seignur le Roy il voet qe tous ceux qi facent aucuns tielz demandes de luy a contraire de cest estatut soient punitz par advis de luy et de son conseil et qe celuy qensi face tiele demande jammais nait la chose ensi demandee" (5).

(5) In the later editions of Ruffhead's Statutes, the 4 Hen. 4, c. 4, is not printed. The title only is given, marked as *expired*. The statute, however, will be found in the "Statutes of the Realm." Probably it was understood to apply to the particular monarch only, and therefore expired on his demise.

1838.

THE DUKE OF GRAFTON v. THE LONDON AND BIRMINGHAM RAILWAY CO.

Wilde, Serjeant, in reply.—The statute 3 & 4 Will. 4, c. 74, had in view a great public benefit; to carry into effect the spirit of the legislature, it must receive a large and liberal construction. The court will not intend that the grant in question was a reward for services, inasmuch as there appears affirmatively on the face of it abundant and adequate consideration of another description. Illegitimate children are not wholly disregarded by the law: they are within the provisions of the marriage acts with regard to consent of parents. The object of the 4 Hen. 4, c. 4, was, to restrain the asking of favours: from the time of the passing of that act, it has been usual in grants from the crown to recite that the gift was made ex certâ scientiâ et mero motu.

Cur. adv. vult.

The following certificate was afterwards sent:—

Certificate.

"We are of opinion that the estate tail of the plaintiff, George Henry, Duke of Grafton, and all other estates tail and remainders and reversions thereupon expectant or depending, whether vested in or belonging to the king's most excellent majesty or to any other person or persons, of and in the lands and hereditaments comprised in the indenture of bargain and sale of the 6th day of February, 1835, which were created or reserved by the letters patent of the twenty-fifth year of his late majesty, King Charles the Second, were effectually barred and extinguished by the indenture of bargain and sale above referred to.

"N. C. TINDAL.
"J. A. PARK.
"J. VAUGHAN.
"T. COLTMAN."

1838.

Saturday, Nov. 3rd.

Service upon the sexton who holds the keys of a dissenting chapel is sufficient to found a motion for judgment against the casual ejector.

DOE *d.* SCOTT *v.* ROE.

BALL moved for judgment against the casual ejector. The premises sought to be recovered were, a dissenting chapel. The declaration and notice had been duly served upon a female who held the office of sexton, and who was alleged in the affidavit to be the tenant in possession. A copy had also been served upon each of the surviving lessees or trustees of the chapel.

PER CURIAM.—The rule may go. The possession of the sextoness is the possession of the lessees.

Rule granted (6).

(6) See Doe d. Dickens v. Roe, post, p. 754.

Monday, Nov. 5th.

The court will not entertain a preliminary motion to dispense with the production of a bill of exchange before the Master, on a rule to compute.

LANDERS *v.* LEE.

ASSUMPSIT on a bill of exchange for 13*l.* 7*s.* 3*d.*, dated the 9th July, 1837, payable two months after date. The defendant suffered judgment by default.

Busby, on the part of the plaintiff, now moved that it might be referred to the Master to compute principal and interest without producing the bill before him, upon a suggestion that its production had been rendered impossible by a fraud on the part of the defendant.

TINDAL, C. J.—Instead of coming to the court in the first instance, the proper and the least expensive course would have been for the plaintiff to submit to the Master such evidence as he may be prepared with; and, if dissatis-

fied with his decision, it will then be time enough to apply here.

1838.

LANDERS v. LEE.

The rest of the court concurring—

Rule refused (7).

(7) In Green v. Hearne, 3 T. R. 301, it was held, that, if a defendant who is sued as the acceptor of a bill of exchange, suffers judgment by default, he admits his liability to that amount; and therefore, though the bill must be *produced* on executing the writ of inquiry, it need not be *proved*. And Buller, J., said: "The only reason for producing it to the jury on executing the writ of inquiry, is, to see whether or not any part of it has been paid."

And see Bevis v. Lindsell, 2 Str. 1149.

CATTELL and Another v. GAMBLE.

Monday, Nov. 5th.

ASSUMPSIT for the use and occupation of certain pasture land, and the eatage of the grass. Pleas, as to all but 30*l.* 15*s.*, non assumpsit, and as to that sum several pleas in discharge, upon which no question arose.

The cause was tried before the undersheriff for the county of Warwick on the 15th August last. It appeared that the plaintiffs sought to recover a sum of 14*l.* 5*s.*, the balance of the price of a lot knocked down to the defendant at a public auction on the 27th April, 1835, described in the catalogue as "the herbage of Upper and Lower Townshend's closes, and the Priory," for which the defendant had agreed to give 45*l.* In support of the plaintiffs' case the conditions of sale were put in, at the foot of which was the following memorandum signed by the defendant, and stamped with a 1*l.* stamp:—"I have purchased Lot 2 under the above conditions of sale." The conditions of sale were as follow:—

The defendant became the purchaser at an auction of a lot described as "the herbage of Upper Townshend's Close, Lower Townshend's Close, and the Priory," at the price of 45*l.*; by the conditions of sale it was agreed that a deposit of ten per cent. should be paid, and a bill given for the residue, and that the purchaser should be entitled to *possession* of the lot until the 29th September. The contract of purchase at the foot of the conditions, signed by the defendant, was stamped with a 1*l.* stamp:—Held, that this was a lease of hereditaments granted in consideration of a sum of money by way of premium under 50*l.*, without any yearly rent; and therefore properly stamped with a 1*l.* stamp.

1838.

CAPPELL v. GARNER.

"1. The highest bidder for each lot shall be the party entitled to possession for the time stipulated, under the following conditions, free from the parish rates and tithes:

"2. The highest bidder for each lot shall pay down immediately on such highest bidding being declared, into the hands of the auctioneer, a deposit of 10*l.* per cent. on the amount of his bidding, and give a satisfactory joint note for the residue thereof, payable on the 21st of August next.

"3. The *lessees* shall be entitled to possession of their respective lots until the 29th September next.

"4. Each party becoming *lessee* as aforesaid shall on the 29th September next peaceably and quietly yield up the possession of the respective lots to the owner of the same respectively; and, in case of any delay in so doing, the party or parties making default shall be deemed a wilful trespasser or trespassers, and forcible possession shall and may be taken of each and every lot so withheld, and the cattle and stock thereon shall and may be impounded accordingly.

"5. If any purchaser shall fail to give such satisfactory joint note as aforesaid, his deposit money shall be absolutely forfeited, and the vendors, in that case, or any other case of default, shall be at liberty to re-let the premises either by auction or private contract, as they may think right, and the deficiency, if any, thereby occasioned, and all expenses thereon attendant, shall be made good by the defaulter, and be recoverable by the vendors as and for liquidated damages."

It was objected, on the part of the defendant, that the above memorandum was not admissible in evidence for want of a *lease stamp*. The undersheriff received the document in evidence, and a verdict was found for the plaintiff for the sum claimed, subject to a motion to enter a nonsuit if the court should be of opinion that the stamp was insufficient.

1838.

CATTELL v. GAMBLE.

Channell now moved accordingly.—In Bacon's Abridgment, *Leases* (K), it is said: "It may be laid down for a rule, that, whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose: and, on the contrary, if the most proper and authentic form of words whereby to describe and pass a present lease for years be made use of, yet, if upon the whole deed there appears no such intent, but that they are only preparatory and relative to a future lease to be made, the law will rather do violence to the words than break through the intent of the parties; for, a lease for years being no other than a contract for the possession and profit of the lands on the one side, and a recompence of rent or other income on the other, if the words made use of are sufficient to prove such a contract, in what form soever they are introduced, or however variously applicable, the law calls in the intent of the parties, and models and governs the words accordingly. My Lord Coke tells us that the words *demise, grant, betake*, and *to farm let*, and whatever other words amount to a grant, may serve for a lease for years. So, he says, *dedi* is a sufficient word to make a lease for years. So, if one only license another to enjoy such a house or land till such a time, this amounts to a present and certain lease or interest for that time, and may be pleaded as such." The effect of the instrumen there was, that the plaintiff should divest himself of the possession of the closes in question, and that the defendant should come into possession, and enjoy them from the time of the sale to the Michaelmas following; down to which period his interest would be one

1838.

CATTELL v. GAMBLE.

in respect of which he might maintain an ejectment. [*Bosanquet*, J.—The defendant became the purchaser for 45*l.* of an interest in the land for a certain term. That seems to be a case provided for by the 55 Geo. 3, c. 184, sched. Part 1, title "Lease," which provides that there shall be paid for a "lease or tack of any lands, *hereditaments*, or heritable subjects, granted in consideration of a sum of money by way of fine, premium, or grassum paid for the same, without any yearly rent, or with any yearly rent under 20*l.*—the same duty as for the conveyance on the *sale* of lands for a sum of money of the same amount:" and this we find, on turning to title "Conveyance," to be 1*l.*] It may be, that, if the entire consideration here were stipulated to be paid at once, a 1*l.* stamp would suffice. But, inasmuch as the 45*l.* were not to be payable at one time, that sum is not to be considered as a premium. [*Vaughan*, J.—Is the sum agreed to be paid the less a premium because a day is given for the payment of part?] The payment of a premium supposes one single act: here three several acts are to be done by the purchaser or lessee—the payment of the deposit of 10 per cent., the giving a joint note for the residue of the purchase money, and the payment of such residue on the day stipulated; and the interest is to vest immediately, if at all, in the lessee. The contract is rather a contract upon condition: and would therefore more properly fall within the description in the schedule, of a "Lease or tack of any kind not otherwise charged," and consequently be liable to a duty of 1*l.* 15*s.*

TINDAL, C. J.—Unless the instrument in question is to be considered as a lease, the case presents no difficulty. Assuming it to be a lease, it certainly does not range itself within the description given in Bacon's Abridgment. There is no reservation of rent, properly so called: the grantor is to receive a gross sum in specie or in security. The question then is, under what head in the schedule to

1838.

CATTELL v. GAMBLE.

the stamp act the instrument falls. The first we find under title "Lease," is—"Lease or tack of any lands, *hereditaments*, or heritable subjects, granted in consideration of a sum of money by way of fine, premium, or grassum paid for the same, without any yearly rent, or with any yearly rent under 20*l.*;" the second is—"Lease or tack of any lands, hereditaments, or heritable subjects, at a yearly rent, without any sum of money by way of fine, premium, or grassum paid for the same;" and the third—"Lease or tack of any lands, hereditaments, or heritable subjects, granted in consideration of a sum of money by way of fine, premium, or grassum, and also a yearly rent amounting to 20*l.* or upwards." The instrument in question is clearly not within either of the two latter clauses; but I have no difficulty in saying that it falls within the first, and therefore is subject to the same duty as for the conveyance on *the sale of lands for a sum of money of the same amount:* and, turning to title "Conveyance," we find that a "Conveyance, whether grant, disposition, *lease*, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, *upon the sale* of any lands, tenements, rents, annuities, or other property real or personal, heritable or movable, or of any *right, title, interest or claim in, to, out of, or upon any lands*, tenements, rents, annuities or other property—that is to say, for and in respect of the principal or only deed, instrument, or writing whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser or purchasers, or any other person or persons by his, her, or their direction," where the purchase or consideration money amounts to 20*l.* and not to 50*l.*, requires a 1*l.* stamp only. I therefore think that the stamp in the present case was sufficient, and consequently that the instrument was properly received in evidence.

The rest of the court concurring—

Rule refused.

1838.

DAVIES and Wife, Demandants; WILLIAM SELBY LOWNDES, Tenant.

Wednesday, Nov. 7th.

On a motion for the examination of a witness under the 1 Will. 4, c. 22, on the ground of a physical inability to attend, the affidavit of a medical man must be produced.

GRAY, on behalf of the tenant moved for a rule, calling upon the demandants to shew cause why a commission should not issue for the examination of one Margaret Devonald. The motion was founded upon the affidavit of the tenant's attorney, who deposed that the party named was a material and necessary witness on behalf of the tenant; that Pennybank, her place of residence, was distant from Westminster Hall about 270 miles; that she was eighty-one years old, and very infirm; that, in the month of October last, she met with an accident which might probably terminate her life, and still confined her to her bed, and which accident, added to her age and infirmity, rendered it in the judgment of the deponent not likely that she would be sufficiently recovered to be able to travel from Pennybank to London to attend the trial of the cause. [*Tindal*, C. J.—We must have the affidavit of a surgeon who has visited the party.] The examination cannot be used at the trial, unless the tenant is prepared to shew by proper evidence that the personal attendance of the witness is impracticable. [*Bosanquet*, J.—If your inference be correct, a party may always ascertain the evidence to be given by a particular witness, and then use it or not as it may be found convenient.]

TINDAL, C. J.—There can be no difficulty in getting the affidavit of a medical man.

Rule refused (8).

Wednesday, Nov. 14th.

ON this day, *Gray* renewed his application, upon an affidavit of a medical man, who deposed that he attended

(8) See Abraham v. Norton, 1 M. & Scott, 384.

1838.

DAVIES Dem., LOWNDES Ten.

on the 10th instant at the residence of Margaret Devonald, at Pennybank, and found her afflicted with certain infirmities, which in his judgment and opinion rendered it impossible for her to travel to London without endangering her life; and stated his belief, that the age and nature of the diseases and infirmity of the proposed witness rendered it very improbable that she would ever be able to do so.

A rule nisi was granted, and was subsequently, by consent, made absolute.

BATEMAN *v.* DUNN.

Thursday, Nov. 8th.

THE defendant in this case was arrested on the 13th of September last, and gave a bail-bond on the 27th. On the 3rd October, a summons was obtained, calling on the plaintiff to shew cause why the bail-bond should not be cancelled, and an exoneretur entered on the bail-piece, under the statute 1 & 2 Vict. c. 110, which came into operation on the 1st October, and by the 6th section of which it is enacted—"That it shall be lawful for any person arrested upon any writ of capias to apply at any time after such arrest to a judge of one of the superior courts at Westminster, or to the court in which the action shall have been commenced, for an order or rule on the plaintiff in such action, to shew cause why the person arrested should not be discharged out of custody; and that it shall be lawful for such judge or court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such other order therein as to such judge or court shall seem fit; provided that any such order made by a judge may be discharged or varied by the court, on application made thereto by either party dissatisfied with such order:"—and by s. 7—"That every prisoner who at the time appointed for the commencement of this act shall be in

Upon the equity of the 1 & 2 Vict. c. 110, s 7, a defendant who was arrested and had given bail before that statute came into operation, was held entitled to have an exoneretur entered upon the bail-piece on entering a common appearance.

The affidavit upon which to found an application for an order to arrest or detain a party under ss. 3 and 7, must be such as to shew to the satisfaction of the court or the judge that there is probable cause for believing that he is *about to quit* England unless he be *forthwith* apprehended; and must shew the grounds of such belief.

1838.

BATEMAN v. DUNN.

custody upon mesne process for any debt or demand, and shall not have filed a petition to be discharged under the laws now in force for the relief of insolvent debtors, shall be entitled to his discharge upon entering a common appearance to the action: provided, nevertheless, that every such prisoner shall be liable to be detained, or, after such discharge, to be again arrested, by virtue of any such special order as aforesaid, at the suit of the plaintiff at whose suit he was previously arrested, or of any other plaintiff."

The application was opposed upon an affidavit stating that the action was brought against the defendant as the acceptor of a bill of exchange, that he was an Irish barrister, having no domicile in England, and that the deponent believed he was about to return to Ireland. An affidavit was produced on the part of the defendant, in which he swore he had no present intention of leaving England. On the 16th October, Coltman, J., ordered the bail-bond, to be cancelled, and an exoneretur to be entered on the bail-piece.

Wilde, Serjeant, on a former day in this term, obtained a rule nisi to discharge this order, on the ground that the statute gave no authority for the discharge of bail, but only for the discharge of the defendant from *actual custody*.

Sir F. Pollock now shewed cause.—The simple question is, whether or not this is a case in which a judge would be warranted in making an order for holding the defendant to bail, under the 3rd section of this act; if not, the order that has been made cannot be impeached. The statute having for its object the abolition of imprisonment on mesne process, it ought to be liberally construed in favour of the liberty of the subject. There is certainly no provision in the act that is strictly and directly applicable to

1838.

BATEMAN v. DUNN.

the circumstances of this case: but, if the defendant were to render in discharge of his bail, he would clearly be entitled to be released from custody under the 7th section; and therefore, by analogy to the well known practice with regard to the discharge of bail, where the principal has become bankrupt, and obtained his certificate, the court or a judge may well do that which has been done here.

The affidavit upon which the order was opposed, was not sufficient either to warrant the defendant's detention under the 7th section, or the issuing of a capias under the 3rd section. To authorize such arrest or detention, the affidavit must make it appear to the satisfaction of the court or judge, that "there is probable cause for believing that the defendant is about to quit England, unless he be *forthwith* apprehended." All that is stated here, is, that the defendant is an Irish barrister, having no permanent residence here; and it is desired that the court shall thence infer the existence of such necessity as the statute contemplated, for putting him under restraint.

Wilde, Serjeant, in support of his rule.—The act in question is avowedly speculative, and of very doubtful policy; and therefore ought not to be carried beyond the plain meaning of its words. The defendant, whose residence is in Ireland, being in this country, is arrested, and gives a bail-bond: what pretence is there for saying that he is "in custody upon mesne process for a debt or demand," within the meaning of the 7th section? He is not in *actual* custody, nor can it be presumed from anything that appears that he ever will be in custody. The act gives power to the court or a judge to discharge parties from custody in certain cases; the present is not one of those cases; and it is not to be supposed that the legislature had overlooked the fact, that, before the act would come into operation, many arrests would take place upon which bail-bonds would be given. In the case suggested,

1838.

BATEMAN v. DUNN.

of the bankruptcy of the principal, where the courts have been in the habit of entering an exoneretur on the bail-piece, without putting the bail to the trouble and expense of a previous useless render, the creditor's remedy is absolutely barred; and therefore there is no analogy between that case and the present. Suppose, instead of giving a bail-bond, the defendant had deposited the debt and 10*l.* for costs in the sheriff's hands, under the 43 Geo. 3, c. 46, s. 2, and that sum had afterwards been paid into court, with an additional 10*l.*, under the 7 & 8 Geo. 4, c. 71, s. 2, in lieu of special bail; would the defendant be permitted to take the money out upon a summary application under this act? (7) And if not, what reason can there be for interfering in the case of bail? For, the defendant may always, where he has paid the money into court, indirectly obtain the same advantage, by first putting in bail, and so getting the money out, and then applying to the court or a judge to enter an exoneretur on the bail-piece in the manner here prayed. [*Coltman*, J.—Where money is paid into court in lieu of bail, the defendant is not in danger of being rendered, and therefore he cannot be said to be even constructively in custody: but, where he has given bail, he may always be rendered.] Having paid money in, the defendant may always get it out by putting in bail, and thus by a circuitous route obtain all the benefit that a defendant in the constructive custody of his bail can have.

The affidavit upon which the order of the learned judge was resisted was sufficient to warrant an order for the defendant's arrest under s. 3; à fortiori therefore it was sufficient to warrant his detention under s. 7. It is sworn

(9) This question arose in Harrison v. Dickinson, 7 Dowl. 6, and the court of Exchequer held that a defendant who had paid money into court in lieu of bail before the statute came into operation, could not in any sense be said to be in custody, so as to be entitled to relief under the 7th section.

1838.

BATEMAN v. DUNK.

that the defendant is an Irish barrister, having no fixed place of abode in this country. Where a man's whole business and concerns, and his place of abode, are out of England, is there not reasonable ground for presuming that he will go home? Strict legal proof is not required; it is enough to shew some rational ground upon which a man might in the ordinary course of things be presumed to act. The statute does not require it to be shewn that there is probable cause for believing that the defendant is about *to quit England forthwith;* but that he is about to quit England, *unless he be forthwith* apprehended: and here the defendant does not swear that he is not about to quit England, but only that "he has no *present* intention of leaving England."

TINDAL, C. J.—The application involves two points—the first one of a very general and important nature, viz. whether or not the order made by my Brother Coltman for cancelling the bail-bond given by the defendant on his arrest, and entering an exoneretur on the bail-piece, was under the circumstances authorized by the act—the second, only applying to the particular case, whether the matters disclosed in the plaintiff's affidavit were sufficient to warrant the detention of the defendant under the 7th section.

I. If I entertained the slightest doubt upon the first of these points, I should desire time to consider. The question is, whether a party arrested on mesne process before the 1st October, the day on which the statute 1 & 2 Vict. c. 110 came into operation, and discharged on giving a bail-bond, is entitled to have the bail-bond delivered up to be cancelled, and an exoneretur entered on the bail-piece. This question appears to me to involve two considerations—first, whether or not the court or a judge has authority to discharge from custody a defendant who has been arrested before, and rendered by his bail

I. As to the jurisdiction.

1838.

BATEMAN v. DUNN.

after the 1st October—secondly, whether they have authority, where the defendant has *not* been rendered, either by an equitable construction of the act, or by analogy to other cases, to order an exoneretur to be entered on the bail-piece.

1. Defendant arrested before and rendered after the act came into operation.

1. In the case of a defendant not in actual custody on the 1st of October, it appears to me, that, if he is afterwards rendered to prison, there is no ground for contending that he is not within the purview of the act. True it is that the 7th section provides, "that every *prisoner* who at the time appointed for the commencement of the act shall be *in custody* upon mesne process for any debt or demand, and shall not have filed a petition to be discharged under the laws now in force for the relief of insolvent debtors, shall be entitled to his discharge upon entering a common appearance to the action;" and it may be said that a defendant out on bail is not, according to the letter of the act a prisoner. But it is to be observed that the clause speaks of persons who "shall be *in custody* for any debt or demand;" and I am not prepared to say, that, in construing an act the primary object of which is to abolish imprisonment for debt in all save certain limited and excepted cases, we may not fairly interpret the word "custody" to embrace one who in legal intendment is in the custody of his bail. It is not, however, necessary to have recourse to that; for, it would be a singular construction to put upon an act passed with a view to the abolition of arrests, to hold that one set of persons arrested after the passing of the act and before the time appointed for its commencement, shall be kept in custody, while another set are discharged. It appears to me that the present case falls within the spirit and meaning of the act. With its general policy or expediency we have nothing to do. Our duty is to administer the law to the best of our judgment, so as to give the fullest effect and operation to the apparent intention of the legislature.

1838.

BATEMAN v. DUNN.

8. The next question is, whether or not this is an application which the court or a judge has authority by the act to accede to. The bail having it in their power at any time to render the defendant (in which case he would clearly be within the act), it would be almost absurd to hold that the expense and inconvenience of the idle ceremony of a render must be incurred. And it appears to me to make no difference whether the application is made on the defendant's part, or on that of the bail; the costs to the former would be the same in either case. In adopting this conclusion, we are borne out by analogy to the course that has been adopted with regard to bankrupts from a very early period; when the bankrupt having obtained his certificate, is clearly entitled to his discharge, the court, on motion, or a judge, on summons, to avoid circuity, have been in the habit of directing an exoneretur to be entered on the bail-piece, without the form of a regular surrender by the bail. The earliest reported case upon the subject is probably that in Barnes, 104, where the editor observes that the same course had before been pursued in the King's Bench. And the practice seems to have uniformly prevailed from that time to the present. I am wholly unable to perceive any substantial distinction between an application to enter an exoneretur on the bail-piece in the case of a certificated bankrupt, and in the present case, save that here a common appearance must be entered. Upon the whole, it seems to me that my Brother Coltman had authority to make the order in question.

2. Defendant not rendered.

II. This brings us to the second point, viz. whether or not enough is shewn upon the affidavit in the present case to authorize the detention of the defendant in custody, or, in other words, to warrant the judge in refusing him relief under the act: and this will depend upon the construction of the 3rd section; for, the proviso in the 7th section throws back the consideration of the question upon

II. As to the form of the affidavit.

1838.

BATEMAN v. DUNN.

the 3rd, which enacts, "that, if a plaintiff in any action in any of her majesty's superior courts of law at Westminster, in which the defendant is now liable to arrest, whether upon the order of a judge, or without such order, shall, by the affidavit of himself or of some other person, shew, to the satisfaction of a judge of one of the said superior courts, that such plaintiff has a cause of action against the defendant or defendants to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant or any one or more of the defendants is or are about to quit England unless he or they be forthwith apprehended, it shall be lawful for such judge, by a special order, to direct that such defendant or defendants so about to quit England shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt or damages; and thereupon it shall be lawful for such plaintiff within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of capias into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of capias shall be in the form contained in the schedule to the act annexed, and shall bear date on the day on which the same shall be issued." The order, therefore, for the defendant's arrest under s. 3, or for his detention under s. 7, is to be obtained upon an affidavit shewing to the satisfaction of the court or the judge that the plaintiff has a cause of action to a certain amount, and that there is probable cause for believing that the defendant is *about to quit* England unless he be *forthwith* apprehended: and it appears to me that the affidavit should shew the grounds upon which such belief is founded. In the affidavit relied on upon the present occasion, the deponent neither pledges his belief, nor shews ground to warrant a belief that the defendant will quit England unless forthwith coerced.

For these reasons I am of opinion that the rule must be discharged. 1838.

BATEMAN v. DUNN.

VAUGHAN, J.—I am of the same opinion, though it is not without considerable difficulty that I have arrived at this conclusion. I agree the act should be construed liberally. With the policy of the law we have nothing to do; we have only to administer it: but I cannot help lamenting that the statute in question was called into operation at a period when none of the courts were sitting, whereby the responsibility of deciding very nice and difficult questions of construction was imposed upon those judges whose duty it was to attend at chambers. I think the present case is within the equity of the statute: a party may fairly be said to be in custody when out upon bail. The affidavit in the present case, though pregnant with inference, does not contain a sufficient statement of facts to enable the judge to conclude that the defendant is, in the words of the statute, about to quit England, unless forthwith apprehended.

As to the jurisdiction.

BOSANQUET, J.—I also am of opinion that this rule should be discharged. It is the bounden duty of the court to carry into effect the provisions of the act in the spirit of the legislature. The first question is one of a very general and important nature—as to the jurisdiction of the court or a judge in a case where the defendant is not in *actual* custody. I am of opinion, that, where a defendant has given bail, and the bail are in a condition to discharge themselves by rendering the principal, the court is fully authorized by the statute, unless the peculiar circumstances of the case prevent the exercise of that authority, to relieve the bail by ordering an exoneretur to be entered on the bail-piece, so as to avoid the circuity and useless expense of a render and an application on the part of the defendant himself for his discharge from custody.

1838.

BATEMAN v. DUNN.

The words of the 7th section are—"that every prisoner who at the time appointed for the commencement of this act shall be *in custody* upon mesne process for any debt or demand, and shall not have filed a petition to be discharged under the laws now in force for the relief of insolvent debtors, shall be entitled to his discharge upon entering a common appearance to the action." It is not necessary upon this occasion to determine the precise meaning of the words "in custody." If it were so, I should feel disposed to hold that a party at large on bail is in legal *custody* within the meaning of the act; the more especially as the 35th section, which relates to applications for discharge to the Insolvent Debtors Court, speaks of persons "who shall be in *actual* custody *within the walls of any prison*"—words that are not found in the 7th section. But, whether that be so or not, I am of opinion, that, where the bail are entitled to render the defendant, the court may, by analogy to the well known practice with regard to certificated bankrupts, order an exoneretur to be entered at once.

As to the form of the affidavit.

The next question is, whether or not the learned judge was, under the particular circumstances of this case, properly called upon to detain the defendant. The third section authorizes the judge to make a special order for holding the defendant to bail, upon an affidavit *shewing to his satisfaction* that the plaintiff has a sufficient cause of action, and *that there is probable cause* for believing that *the defendant is about to quit England unless he be forthwith apprehended.* "About" is a very vague and general word; a suspicion that the party is likely to quit England at no very distant period, might very well satisfy the conscience of the person making the affidavit: but the words that follow—"unless he be *forthwith* apprehended"—shew that the statute contemplates the case of a necessity for an immediate arrest: and to that the deponent must pledge his belief. The act gives the form of a capias,

1838.

BATEMAN v. DUNN.

which the sheriff is directed to return, not at the expiration of four months, as in the case of an ordinary writ of capias, but at the expiration of *one* month, or sooner if thereto required by order of the court or a judge—clearly shewing that the case pointed at is one in which a speedy execution of the process is rendered necessary (10). And it seems to me that the opposition to a defendant's discharge under the 7th section, should be founded upon an affidavit in the same form as that required for the issuing of a writ under the 3rd section: the party making the affidavit should pledge his conscience to the fact of there being probable cause for believing that the defendant is about to quit England unless he be forthwith apprehended, and should state the particular facts upon which such belief is founded. In these respects the affidavit in the present case is deficient.

COLTMAN, J.—It appears to me that the order in question was not improperly made: the case is fairly within the intention of the act of parliament; and there is also good ground for contending that it is within the words. A party out on bail is in contemplation of law in the custody of his bail. It may be too much, perhaps, to rest our determination upon that: I would rather rest it upon the analogy to the case of a certificated bankrupt, where, in order to avoid the idle and expensive form of a render of the bankrupt, and then an immediate application for his discharge, to which he is by law entitled, the courts have for a long period permitted the parties to take the whole leap at once.

With respect to the form of the affidavit—I do not

(10) The 3rd section applies to every case of absence from England, which will delay the plaintiff in obtaining execution in the ordinary course. Larchin v. Willan, 7 Dowl. 11. There the defendant was an officer in the army, and about to go abroad to join his regiment.

1838.

BATEMAN v. DUNN.

think it discloses sufficient grounds for an order to hold the defendant to bail. Upon the simple fact of the defendant being domiciled in Ireland, I did not feel myself justified in withholding his discharge. The only additional ground suggested, was, that the party was a practising barrister: but it did not appear to me necessarily to follow that he must be forthwith going to quit this country. To warrant the arrest or the detention of a party, the affidavit should disclose facts reasonably calculated to shew that he contemplates an evasion of the ordinary process.

Rule discharged, without costs (11).

(11) In Lewis v. Ford, 4 M. & Welsby, 361, 7 Dowl. 85, where a defendant, who was arrested on mesne process, and gave bail before the 1st October, 1838, immediately on his discharge went and still remained abroad, the Court of Exchequer refused to enter an exoneretur on the bail-piece.

In The Queen v. The Sheriff of Middlesex, 7 Dowl. 82, the sheriff, being in default, put in bail before the 1st October, 1838, and an attachment issued against him on the 2nd November for not bringing in the body: and it was held that the court had no power to relieve him on entering a common appearance under s. 7.

A defendant who is brought up by habeas corpus to be charged in execution, is not in custody on mesne process within the act. Reynolds v. Simmonds, 7 Dowl. 85.

A party having been arrested on mesne process, escaped from prison before the statute passed, but was retaken after it came into operation—held that he was not entitled to be discharged. Nias v. Milton, 7 Dowl. 90.

A judge has no authority under s. 7, to make an order for the detention of a prisoner in custody at the time of the passing of the act, "until he shall give bail, *or until further order.*" Boddington v. Woodley, 1 Perry & D. 159.

In Jackson v. Cooper, 7 Dowl. 5, the defendant having been arrested on mesne process, was out on bail on the 1st October, 1838, after that day final judgment was signed, and on the 6th November, a ca. sa. to fix the bail was lodged at the sheriff's office, but before it was returnable a motion was made to enter an exoneretur on the bail-piece: and it was held that the bail were not entitled to relief under s. 7. Parke, B., in delivering the judgment of the court says (7 Dowl. 11): "We cannot relieve the bail per saltum in the manner suggested, for we are not sure that the defendant is in a situation to be rendered; and, if we were,

1838.

Friday, Nov. 23rd.

DALTON *v.* GIBB.

The court refused to enter an exoneretur on the bail-piece under the 1 & 2 Vict. c. 110, s. 7, where the defendant was resident in Scotland.

HAYES, on a former day in this term, obtained a rule calling on the plaintiff to shew cause why an exoneretur should not be entered on the bail-piece, under the 1 & 2 Vict. c. 110, s. 7: it appeared that the defendant was arrested and gave bail in January last.

Miller now shewed cause, upon an affidavit stating that the defendant was and had been ever since bail had been put in resident in Scotland. He submitted, on the authority of *Larchin* v. *Willan*, 7 Dowl. 11, that this was a conclusive answer to the application.

Hayes, in support of his rule, referred to *Bateman* v. *Dunn*, and submitted that here, as there, the defendant might be considered in custody; a party out on bail being in contemplation of law in the custody of his bail.

TINDAL, C. J.—The ground of our decision in *Bateman* v. *Dunn* was, that the bail were in a condition to render the defendant. Here that is impossible, the defendant being in Scotland. This rule must therefore be discharged; the costs may be costs in the cause.

The rest of the court concurring—

Rule discharged.

though in the first instance he might be in custody on mesne process, still, as final judgment has been signed, and a ca. sa. issued, he might be charged in execution immediately, and thus placed in actual custody on final process."

The act does not apply to a case where the bail would not be relieved under the old practice without the bail-bond standing as a security. Dawes v. Salomonson, C. P., Michaelmas Term, 1838. Per Tindal, C. J.

And see the next two cases.

1838.

Monday, Nov. 26th.

Where the defendant had been arrested and had given a bail-bond, the court (on the equity of the statute 1 & 2 Vict. c. 110) stayed proceedings on the bail-bond without an affidavit of merits.

NORRIS *v.* BRIGHTON.

THE defendant was arrested on the 6th of August last. Special bail not having been put in in due course, the plaintiff took an assignment of the bail-bond, and on the 31st October, commenced an action against the bail. An appearance was entered in the action against the bail on the 15th instant, but the plaintiff had not declared.

Wilde, on a former day, obtained a rule calling on the plaintiff to show cause why the proceedings on the bail-bond should not be stayed, and why the bail-bond should not be delivered up to be cancelled, on entering a common appearance, under the 1 & 2 Vict. c. 110, s. 7.

Kelly now shewed cause.—Before the passing of the act, if the defendant himself applied for relief, he must have done so upon an affidavit of merits; if the application were made on behalf of the bail, they must make an affidavit negativing collusion, and then they would be let in upon the terms of the bail-bond standing as a security. Here there is no affidavit of merits; and the application does not appear to be made on the part of the bail. [*Tindal*, C. J.—The only consequence of our refusing to accede to this application will be, that bail above will be put in merely for the purpose of rendering the defendant, and then the defendant will be entitled to his discharge without any affidavit of merits. The bail will not come to the court; they will render the defendant.] The statute upon which this motion is founded was made for the benefit of debtors: this is an attempt to extend it to the relief of bail who are in default, and against whom the plaintiff is regularly and properly prosecuting a right of action given him by statute. The 1 & 2 Vict. c. 110, only applies where the defendant could before have been rendered by his bail in their discharge.

1838.

NORRIS v. BRIGHTON.

Wilde, Serjeant, in support of his rule.—Putting an equitable construction upon the statute, the court will grant relief in the first instance in all cases where the defendant is in a condition to be rendered in discharge of his bail. This is not an application to the general jurisdiction of the court to stay the proceedings; but an application on the part of the defendant that he may be relieved from the inconvenience and expence of a render. For this purpose no affidavit of merits is necessary: all that is required, is, an affidavit to shew that the defendant is in custody under circumstances under which he ought not to be in custody, This is no more than this court did on a former day in *Bateman* v. *Dunn*, or than the other courts have since repeatedly done. The case is clearly within the statute.

TINDAL, C. J.—It appears to me that this case falls within the principle upon which the courts have been acting in the construction of this statute. The question is, how should we deal with the defendant if actually in prison? We could only discharge him on entering a common appearance; and that without any affidavit of merits: I do not therefore see why we should require an affidavit of merits now. We will take care, that, in exercising the jurisdiction given to us by the statute, we deprive the plaintiff of no advantage he may by the practice of the court have become entitled to. The costs of the action against the bail should be paid.

The rest of the court concurring—

Rule absolute.

1838.

Monday, Nov. 10th.

Service in ejectment for a chapel of ease.

DOE *d.* DICKENS and Others *v.* ROE.

PEACOCK moved for judgment against the casual ejector. The affidavit upon which the motion was founded stated that the action was brought to recover possession of a chapel of ease, called St. Andrew's Chapel, in the parish of Hove, in the county of Sussex, erected under and by virtue of an act of parliament (9 Geo. 4, c. xv.); that by the said act it was enacted that it should be lawful for the minister or curate for the time being to appoint from amongst the proprietors of pews or seats in the said chapel a proper person to the office of chapel-warden, and that there should from time to time be appointed by the minister or curate of the said chapel a clerk of the said chapel; that there had not been and was not any person appointed to the office of or acting as chapel-warden of the said chapel; that James Parsons, of Hove aforesaid, had been appointed and was then acting as the clerk of the said chapel, and had been and was then intrusted with and in possession of the keys of the said chapel, by and on behalf of Edward Everard hereinafter mentioned; that Edward Everard, one of the persons named in the notice was theretofore minister and curate of the said chapel, and was or claimed to be the lessee of three several undivided fourth parts of and in the said chapel, and was tenant in possession thereof; that George Peacock, another of the persons named in the said notice, was or claimed to be interested in the said undivided fourth parts of and in the said chapel, by virtue of an underlease or assignment thereof from the said Edward Everard; that Owen Marden, another of the persons named in the said notice, claimed to be the minister or curate of the said chapel; that James Parsons, being clerk of the said chapel, was personally served with a copy of the declaration and notice; that another copy was

1838.

Doe d. Dickens v. Roe.

affixed on a notice-board fixed to the outer wall of the chapel, and which board was placed there for the purpose of having notices affixed thereon, and was a notorious and conspicuous part of the chapel; that copies were personally served on George Peacock and Owen Marden; that Edward Everard had absconded for the purpose of avoiding his creditors; and that copies were served on John Brown, the gardener of Dr. Everard, at the dwelling-house of Dr. Everard at Hove; and on the wife of Dr. Everard at a dwelling-house at Brighton occupied by her and her family, and also on Dr. Everard's attorney. He referred to Tidd's Practice, 9th edit., 1212, where it is said, upon the authority of Ruu. Eject., 2 ed., 157, that, "in an ejectment for a *chapel*, the service may be made on the *chapel-wardens*, or on the persons to whom the keys are entrusted."

Tindal, C. J.—I think the service in this case is sufficient to warrant us in granting a rule, which may be absolute in the first instance, for it appears there is no one, Dr. Everard being out of the way, upon whom a rule nisi can with any effect be served. It is of the less consequence, as the judgment in ejectment does not conclude the right.

The rest of the court concurring—

Rule absolute (12).

(12) See Doe d. Scott v. Roe, ante, p. 732.

1838.

Saturday, Nov. 10th.

In a declaration alleging as a breach of a covenant for quiet enjoyment an eviction, it should not be left uncertain whether the party evicting did not claim under title derived from the plaintiff himself.

BROOKES *v.* HUMPHREYS.

THIS was an action of covenant. The declaration stated, that, by an indenture of lease made the 21th of August, 1829, between the defendant of the one part, and one Benjamin Webb of the other part, the defendant demised to Benjamin Webb, his executors, administrators, and assigns, a certain messuage, tenement, and premises, with the appurtenances thereunto belonging, situate in the county of Essex—to hold the said messuage and premises unto the said Benjamin Webb, his executors, administrators, and assigns, from Michaelmas-Day then next, for the term of ten years thence next ensuing, at a rent of 50*l.* a year; that the defendant covenanted that he then had in himself good right to demise the said messuage or tenement and premises, and moreover that Benjamin Webb, his executors, administrators, and assigns, paying the said yearly rent of 50*l.*, in manner therein in that behalf reserved, and observing and performing all and singular the covenants, &c., which on the part of Benjamin Webb, his executors, administrators, and assigns were to be observed and performed, should peaceably and quietly have and enjoy the premises for and during the term thereby granted, without lawful let or disturbance of, from, or by the defendant, his executors, administrators, or assigns, or of, from, or by any person or persons whomsoever; that Benjamin Webb entered, and assigned to the plaintiff during the term; but that the defendant, at the time of making the lease by him to Benjamin Webb, had not in himself good right to demise the said messuage or tenement and premises in manner thereinbefore in that behalf mentioned, being at the time of the making of the lease to Benjamin Webb, seised of and entitled to and interested in the said messuage or tenement and premises, with the appurtenances, for and during the life

only of one Samuel Clapham, which said Samuel Clapham, after the assignment to the plaintiff, and during the continuance, and long before the expiration of the residue of the said term of years, to wit, on the 25th February, 1837, departed this life; whereupon all the title, interest, and claim whatsoever of the defendant, and of all and every person and persons claiming or to claim by, under, or through him, in or to the said premises, or to the possession thereof, and of the plaintiff, under or by virtue of the said assignment to him as aforesaid, utterly ceased and determined; and, during the continuance, and long before the expiration of the residue of the said term of years therein mentioned, and after the death of Samuel Clapham, to wit, on &c., one Elizabeth Noon, then lawfully claiming in that behalf, and from and upon the death of Samuel Clapham, and then having full, just, and good title to the said messuage or tenement and premises, and to the possession thereof, as against the defendant and all and every person and persons claiming by, under, or from him, and as against the plaintiff claiming under the assignment thereinbefore mentioned to have been made to him, entered into and upon the premises with the appurtenances, and therefrom, and from the possession thereof under the said assignment, and for the residue then to come of the said term of ten years, did rightfully and wholly put out, eject, and amove the plaintiff.

Plea.

The defendant pleaded, amongst other things, that Benjamin Webb in the declaration mentioned, did in the in the said indenture of lease, covenant and agree with the defendant, that he, the said Benjamin Webb, his heirs, &c., should and would at his and their own proper costs and charges, during the term, repair, &c., the premises, and that he failed to perform his covenant in that behalf.

Demurrer.

General demurrer, and joinder.

The points for argument on the part of the defendant were, that the payment of rent and performance of the

1838.

BROOKES v. HUMPHREYS.

covenants, were a condition precedent to the plaintiff's right to sue for a breach of the covenant for quiet enjoyment, and that the breach was not well assigned in the declaration.

Argument in support of the demurrer.

Channell, in support of the demurrer.—The defendant granted a lease for a term not expired by effluxion of time, with a covenant that the lessee, his executors, administrators, and assigns, paying the rent, and observing and performing the covenants on his and their part to be observed and performed, "should peaceably and quietly have and enjoy the premises thereby demised, for and during the term thereby granted, without lawful let or disturbance of, from, or by the lessor, his executors, administrators, or assigns, or of, from, or by *any person or persons whomsoever*." The plaintiff, as assignee, complains of an eviction, alleging in his declaration that the defendant was entitled to the premises only for the life of one Clapham, and consequently could not grant for a term absolutely. The non-payment of rent or non-performance of the covenants by Webb, might give the defendant a right to re-enter, or be ground of an action upon the covenants; but the payment of rent is not a condition precedent—*Boone* v. *Eyre*, 2 W. Blac. 1312, 1 H. Blac. 273, n.; *Stavers* v. *Curling*, 3 New Cases, 355, 3 Scott, 740. In *Dawson* v. *Dyer*, 5 B. & Ad. 584, 2 N. & M. 559, premises were demised for a term, at a certain rent, with a proviso for re-entry if the rent should be in arrear twenty-one days: the lessee covenanted to pay the rent, and the landlord covenanted that he, *paying the rent* at the appointed times, should quietly enjoy, &c.: and it was held that the lessee, having been disturbed in his possession, might bring covenant against the landlord, though at the time when the cause of action accrued the rent had been in arrear more than twenty-one days; for that the payment of rent was not a condition precedent to the per-

1838.

BROOKES v. HUMPHREYS.

formance of the covenant for quiet enjoyment. In the course of the argument, Parke, J., said (2 N. & M. 560): "It has been expressly decided by *Hayes* v. *Bickerstaffe*, 2 Mod. 34, Vaughan, 118, 1 Freem. 194, and *Warren* v. *Astal*, T. Jones, 206, that this is not a condition precedent." [*Tindal*, C. J.—Consistently with the breach as alleged in the declaration, the plaintiff may have been evicted by one claiming title from himself.] The defendant not having pointed this out as a ground of special demurrer, cannot now avail himself of the objection unless it be available on general demurrer or in arrest of judgment. In *Noble* v. *Smith*, 1 H. Blac. 34, on a general covenant like this, the breach assigned was, that the plaintiff was evicted in consequence of a judgment in ejectment obtained by one John Yates, *having lawful title to the premises*. To this there was a special demurrer, assigning for cause, "that it did not appear by the said declaration, that the said John Yates therein mentioned, at the time of the supposed eviction and expulsion therein also mentioned, or at any time before or since, had any lawful title to the said premises by, from, or under the defendants, or either of them, or by reason or means of any act, matter, or thing made or committed, or wittingly or willingly suffered by them the defendants, or either of them." Here the language of the declaration points distinctly to the nature of the title under which Elizabeth Noon entered: it alleges that the defendant, at the time of making the lease, was entitled only for the life of Samuel Clapham; that Clapham died, and the defendant's title was thereupon determined; that, after the death of Clapham, "one Elizabeth Noon, *then* lawfully claiming in that behalf, and from and upon the death of Samuel Clapham, and *then*, having full, just, and good title to the premises, and to the possession thereof as against the defendant and all and every person and persons claiming by, under, or from him, and as against the plaintiff claiming under the assign-

As to the sufficiency of the breach assigned.

1838.

BROOKES v. HUMPHREYS.

ment hereinbefore mentioned to have been made to him, entered into and upon the premises, with the appurtenances, and therefrom and from the possession thereof under the said assignment, and for the residue then to come of the said term of ten years, did *rightfully* and wholly put out, eject, and amove the plaintiff." That is clearly sufficient, at least on general demurrer. By pleading over, the defendant has confessed the alleged want of title in him.

TINDAL, C. J.—An implied confession by the defendant in his plea does not confess any thing more than the plaintiff alleges in his declaration—*Wotton* v. *Hale*, 2 Wms. Saund. 180 *c*. All that is stated here may be true, and yet the party by whom the plaintiff complains that he has been evicted, might claim under title derived from himself. This ought not to have been left in doubt. The cases in the note (10) to the case I have referred to, shew that this objection has been allowed after verdict. It is said: "This case has ever since been considered as a leading authority to shew that it is necessary, for the reasons here given, that the plaintiff should state in his declaration in some manner that the person evicting had a lawful title *before or at the time of the date of the grant to the plaintiff*; and that an averment that he had a *lawful title*, without this qualification, is too general, and bad after verdict; for, it will be intended that the title of the person entering is derived from the plaintiff himself:" and numerous authorities are cited.

Channell prayed leave to amend.

Granted.

1838.

Monday, Nov. 12th.

CALLANDER *v.* OELRICHS and Another.

In assumpsit for the breach of an undertaking to effect an insurance according to special instructions, the declaration alleged the duty of the defendants to be to effect the insurance according to the instructions, or, in the event of their inability to do so, to give the plaintiff *notice* of such their inability:—Held, that this was a duty necessarily implied from the nature of the employment.

ASSUMPSIT for the breach of an undertaking to effect an insurance according to special instructions.

The declaration stated, that, before the time of making the promise of the defendants thereinafter mentioned, the plaintiff had shipped a certain large quantity, to wit, eight hundred quarters of wheat, of great value, to wit, of the value of 1,760*l.*, in and on board a certain ship called the Johanna, then lying in the port of London, which said ship or vessel, with the said wheat on board thereof, was about to proceed on a certain voyage from London to Baltimore, in America; and thereupon, on the 22nd April, 1835, in consideration that the plaintiff, at the request of the defendants, had then retained and employed the defendants as his agents, for certain commission and reward to them in that behalf, to sell and dispose of the said wheat on its arrival at Baltimore, and to make and effect a certain insurance thereon upon certain terms and conditions, that is to say, to effect an insurance upon the said wheat, whereby the same should be insured against the perils of the sea for and during the said intended voyage from London to Baltimore, to the amount of the value thereof, to wit, the sum of 1,760*l.*, and that, upon the making and effecting of such insurance, the defendants should stipulate and agree with the assurers thereof in and by any policy or policies of assurance whereby the same should be assured, that the said wheat should be declared subject to particular average above 10*l.* per cent., the defendants undertook and faithfully promised the plaintiff to use due and reasonable diligence in the premises, and faithfully to discharge and execute their duty as such agents, *and, in the event of any difficulty arising in effecting such insurance, or in case they should be prevented effecting such insurance on the terms aforesaid, to*

1838.

CALLANDER v. OELRICHS.

The learned judge left it to the jury to say whether or not it was a condition to be implied from the nature of the transaction, that the defendants should give notice to the plaintiff, in the event of their failing to effect the insurance on the terms mentioned in the plaintiff's letter of the 22nd April, 1835.

The jury found that it was, and accordingly returned a verdict for the plaintiff. The amount of damages was to be the subject of a reference.

Wilde, Serjeant, in the last Easter Term, obtained a rule nisi for a new trial, upon a suggestion that there was no evidence to support the declaration as framed; inasmuch as it did not appear that there had been any express undertaking on the part of the defendants to give the plaintiff notice of their inability to effect a policy with the 10 per cent. clause. He submitted, that, though, where the contract was to be implied from a course of dealing or employment between the parties, it was competent to the plaintiff to declare upon it according to its legal effect, and the duty resulting from it; yet that it was otherwise in the case of an express mercantile contract.

Sir F. Pollock and *R. V. Richards* now shewed cause.—The contract is properly stated according to its legal effect: and whether or not there was such a duty resulting from the employment as that alleged, was rather a question for the jury than a question of law. By the defendants' neglect to give the notice, the plaintiff was deprived of the opportunity of availing himself of the insurance which might have been effected at all events at an advanced premium.

Ogle, in support of the rule.—Having used reasonable diligence to obtain an insurance pursuant to their instructions, the defendants had done their duty. Where a party

to whom an order for insurance is sent, as here, does what is usual to get the insurance made, that is sufficient; he is not obliged to get insurance at all events—Park Ins. 404, n.; *Smith* v. *Cologan*, 2 T. R. 188, n. The usual form of action is case: if that form had been adopted here, the defendants would have been entitled to every benefit of which the underwriter could have taken advantage, such as fraud, deviation, non-compliance with warranty, &c.—*Delaney* v. *Stoddart*, 1 T. R. 22. [*Bosanquet*, J. The sole question is, whether or not the defendants were bound to give notice to the plaintiff of their inability to effect an insurance according to the instructions they received.] In the absence of a special agreement to that effect, the defendants were not bound to give notice. In *Corbett* v. *Packington*, 6 B. & C. 268, 9 D. & R. 258, where, in a declaration on the case, one count stated that the plaintiff, at the request of the defendant, had caused to be delivered to him certain boars, pigs, &c., to be taken care of by the defendant for the plaintiff, for certain reward to him the defendant, and, in consideration thereof, the defendant undertook and then and there agreed with the plaintiff to take care of the boars &c., and to redeliver the same on request: it was held, on motion in arrest of judgment, that this was a count in assumpsit, and could not be joined with counts in case. In answer to an argument urged on the part of the plaintiff, that, as the alleged agreement was only to perform that which was a common law duty, it was unnecessary to resort to any promise, and therefore it might be rejected, and the count be still considered as a count in tort—Bayley, J., said: "The only common law duty of the defendant was, to take care of the pigs delivered to him, until the plaintiff should come and fetch them away; but this count goes beyond that, for, it alleges that the defendant, in consideration of reward to be paid to him, undertook and agreed to take care of the pigs, *and to re-deliver them to the plaintiff on request;*

1838.

CALLANDER v. OELRICHS.

and the breach is that he did not re-deliver them on request. Now, that lays upon the defendant a duty beyond his common law obligation, namely, the duty to redeliver, which arose entirely and exclusively out of the agreement." That case is an extremely strong authority to shew that the plaintiff here should have proved an express promise on the part of the defendants to give notice in the event that happened.

TINDAL, C. J.—I am of opinion that the rule that has been obtained for a new trial in this case must be discharged. The question arises upon a declaration in an action against agents, in which the duty of the agents is stated to be, to cause certain wheat of the plaintiff's to be insured on certain terms, or, in the event of their not causing the same to be so insured, to give notice to the plaintiff within a reasonable time then next following that they had not done so: and the breach assigned is, that the defendants, disregarding their duty as such agents, effected an insurance upon the wheat upon terms different from their instructions, and omitted to give the plaintiff notice as aforesaid, whereby the plaintiff sustained an average loss. The objection is, that there was no evidence given at the trial of any *promise* by the defendants to give the notice stated in the declaration; and the question is, whether this part of the promise is not matter that the law will infer from the general duty cast on the defendants. No doubt, in many cases where actions are brought for breaches of duty, the plaintiff may confine himself to a general allegation of the duty the breach of which he complains of, as in *Powley* v. *Walker*, 5 T. R. 373, where the declaration stated that the defendant became and was tenant to the plaintiff of a certain farm &c., in consideration whereof he undertook and promised not to carry away from the farm any of the straw, dung, compost, &c., and it was held, on motion in arrest of judgment, that the

declaration disclosed a sufficient consideration, viz. the relation of landlord and tenant. So, the plaintiff may incorporate in his declaration the precise duty the breach of which he relies on, taking care not to exceed the limits of what the law will imply, as in *Brown* v. *Crump*, 1 Marsh. 567, where a declaration which stated, that, in consideration that the defendant had become tenant to the plaintiff of a farm, the defendant undertook to make a certain quantity of fallow, and to spend 60*l.* worth of manure every year thereon, and to keep the buildings in repair, was held bad on general demurrer, because those obligations do not arise out of the bare relation of landlord and tenant—whence it may be inferred, that, had they so arisen, there would have been no objection to that form of declaring. This brings us to the question whether or not the giving of notice is or is not a legal liability resulting from the situation of the parties. I am of opinion that it is. The defendants' duty could not be well performed unless they communicated to the plaintiff the fact that they were unable to effect the insurance upon the terms proposed. See the situation of the plaintiff; the failure of the defendants to communicate to him the terms upon which alone they were able to insure the wheat, prevented him from getting it done elsewhere, which possibly he might have succeeded in doing. The case seems to me to fall within the principle of *Smith* v. *Lascelles*, 2 T. R. 186, where it was held, that, if a merchant here has been accustomed to procure insurances for his correspondent abroad in the usual course of trade, the latter has a right to expect an insurance at the hands of the former, unless some previous notice be given to the contrary. Ashhurst, J., there says: "It is true, indeed, that one person cannot compel another to make an insurance for him against his consent: but, if the directions to insure be given to him to whom the application would naturally be made in the usual course of trade, and he does not give notice of his dissent, he must

1838.

CALLANDER v. OELRICHS.

be answerable for his neglect, because he deprives the other of any opportunity of applying elsewhere to procure the insurance." And Buller, J., adds:—"It is now settled as clear law, that there are three instances in which such an order to insure must be obeyed. First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases. The second class of cases is, where the merchant abroad has no effects in the hands of his correspondent, yet, if the course of dealing between them is such that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing. Thirdly, if the merchant abroad send bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction." Suppose the case of an action by landlord against tenant, in which the former declared that the defendant undertook to manage the farm in a husband-like manner and not to pull down the hedges; though no actual promise to that effect were proved, no one could contend that the pulling down the hedges would not furnish a ground of action. Here, the jury have found that the giving of notice was a term necessarily to be engrafted on the defendants' undertaking.

VAUGHAN, J.—I am of the same opinion. The verdict is in strict conformity with law and justice. The sole question is, what was the duty of the defendants under the circumstances? It is said that there was no express stipulation on their part to give notice to the plaintiff of

1838.

CALLANDER v. OELRICHS.

their inability to effect the insurance in strict conformity with their instructions. But it seems to me that this was a duty necessarily arising out of the relation of the parties.

BOSANQUET, J.—I am of the same opinion. The jury found two things—first, that the defendants accepted the retainer and undertook to procure a policy to be effected on the wheat with the ten per cent. clause—secondly, in case of their being prevented from so doing, to give notice to the plaintiff. The first part of the finding is warranted by the correspondence: the jury had a right to assume, from the absence of dissent, that the defendants assented to the order conveyed by the plaintiff's letter of the 22nd April. And, with respect to the second part, it appears to me that the jury were well warranted in finding an implied undertaking on the part of the defendants to give such notice. It is an inference that fairly arises out of circumstances of the case and the situation of the parties. *Smith* v. *Lascelles* is an authority for this: and it makes no difference whether the expectation arises out of the previous dealings between the parties, or out of what the jury find to be a contract or undertaking.

COLTMAN, J.—At the trial it appeared to me that a duty was, from the nature of the employment, cast on the defendants, in the event of their being unable to obey the instructions of the plaintiff, to give him due notice thereof: and nothing that has since been uged before the court has shaken that opinion. If such were the duty by law cast on the defendants, the pleader was justified in so averring it in the declaration. There is no ground for disturbing the verdict.

Rule discharged.

1838.

Wednesday, Nov. 14th.

READ *v.* CROFT.

A replication that the plaintiff had received no notice of the filing of the defendant's petition, though he was resident in England, and might have been served with such notice, is no answer to a plea of the defendant's discharge under the insolvent debtors act.

ASSUMPSIT on a bill of exchange, by the drawer against the acceptor: money counts, &c.

Plea—that therefore, to wit, on &c., by a certain order made by the court for the relief of insolvent debtors in England, held at the Court House in Lincolns' Inn Fields, in the county of Middlesex, he, the defendant (being an insolvent debtor, in custody, and a prisoner in the Queen's Bench prison, in the county of Surrey), was duly discharged according to a certain act of parliament made and passed in the seventh year of the reign of his late majesty King George the Fourth, intituled 'An act to amend and consolidate the laws for the relief of insolvent debtors in England,' and other statutes in that case made and provided and then in force, of and from the said several supposed promises and causes of action, and each and every of them, in the declaration mentioned; and that the said order and discharge still remained in full force—verification.

Replication.

Replication—that the plaintiff did not at any time before the making of the said order have, nor was he served with, any notice whatsoever of the filing of the petition of the defendant upon which he applied for his discharge as aforesaid, and of his schedule in that behalf as such insolvent debtor delivered into the said court for the relief of insolvent debtors, or of the time and place appointed for the hearing the matters of such petition and schedule; and that, at, and thence continually from the time of filing the said petition and schedule, until the making of the said order, he, the plaintiff, was resident within the united kingdom, and could and might have been served with such notice according to the said statutes—verification.

Special demurrer.

Special demurrer, assigning for causes—that it ap-

1838.

READ v. CROFT.

peared in and by the plea that the defendant was duly discharged according to the 7 Geo. 4, and the other acts as in the plea mentioned, by the said order made by the said court for the relief of insolvent debtors in England, which is in force, from the promises and causes of action, and each and every of them, in the declaration mentioned, and that it was not competent for the plaintiff in this cause to dispute or invalidate the order of the said court for the relief of insolvent debtors, by alleging that he had not had or been served with notice, and the other matters in the replication mentioned—that the said court for the relief of insolvent debtors had within their jurisdiction the matters in the petition and schedule, and whether the plaintiff had notice or not, and whether the same was necessary or dispensed with, before they made such order as in the last plea mentioned; and they had decided by their order that the defendant ought to be discharged, and this court would not try the matter over again, and consider whether the court for relief of insolvent debtors had duly (as it was alleged and admitted) discharged the defendant or not, but take it for granted that they had done rightly in discharging him—that, in and by the 7 Geo. 4, it was enacted that the court for relief of insolvent debtors should cause notice of the filing of the petition and schedule, and of the time and place so appointed as in the said act mentioned for hearing the matters of such petition and schedule, to be given by such means as the court should direct to the creditor or creditors at whose suit any such prisoner should be detained in custody, or his, her, or their attorney or agent, and to the other creditors named in the schedule of such prisoner, and whose debts should amount to the sum of *5l.*; and yet it did not appear, as it ought to do, in and by the said replication to the said plea, whether the said court for relief of insolvent debtors had directed or ordered any means whatever to be adopted by which

1838.

READ v. CROFT.

such notice might have been given according to the said last mentioned act—that it did not appear that any notice whatever was required by law, as in the replication mentioned—that the plaintiff, if the want of such notice could be pleaded, ought to have alleged (if such was the fact) in his replication, that the court for relief of insolvent debtors did order certain means to be adopted respecting such notice, setting out such means or order, and that no notice was given according to such order or means—that it was alleged in the replication that the plaintiff was resident within the united kingdom, yet it did not appear in what part in particular of the united kingdom the plaintiff was, and that such residence was known to the defendant, and the defendant could and might have given the plaintiff notice, nor that any notice whatsoever was necessary to be served—and that the replication was in other respects uncertain, informal, and insufficient. Joinder.

James, in support of the demurrer.—The replication is no sufficient answer to the plea. To entitle a prisoner to his discharge under the 7 Geo. 4, c. 57, all that is required of him is, that he shall within fourteen days after the filing of his petition deliver into court a schedule, containing (among other things) "a full and true description of all debts due or growing due from him at the time of filing such petition, and of all and every person and persons to whom he shall be indebted, or who to his knowledge or belief shall claim to be his creditors, together with the nature and amount of such debts and claims respectively—s. 40: it is *the duty of the court* to cause notice to be given to the creditors—s. 42 (13); and they

(13) By which it is enacted "That the said court shall cause notice of the filing of every such petition and schedule, and of the time and place so appointed as aforesaid [by s. 41] for hearing the matters of such petition and schedule, to be given by such

1838.

READ v. CROFT.

have by rule prescribed a certain mode of service of notices by their own officers, who are required to make affidavit in each case of the due service. The replication seeks to put in issue the practice of the insolvent debtors court. [*Tindal*, C. J.—We must assume that the insolvent debtors court would not have discharged the defendant, unless it had been made appear to them that the preliminary steps had been properly taken. The plaintiff should at least have averred in his replication that he did not know of the defendant's discharge.] In *Andrews* v. *Pledger*, 4 C. & P. 275, M. & M. 508, it was held, that, where a defendant pleads that he was *duly discharged* under the insolvent debtors act, and the plaintiff in his replication denies the discharge modo et formâ, it is sufficient for the defendant to prove the order of adjudication for his discharge, and it is not necessary to prove the fact of his having filed his petition, although that fact is essential to give the court jurisdiction.

Humfrey, contrà.—The intention of the 7 Geo. 4, c. 57, was, that parties petitioning for their discharge under it should be released from all debts inserted in the schedule, and of which due notice has been given to the creditor. The plea in this case may be strictly true, and yet the plaintiff's name and debt may never have been inserted in the schedule at all. [*Tindal*, C. J.—The party is not discharged as to debts that do not appear in his schedule.

means as the said court shall direct to the creditor or creditors at whose suit any such prisoner shall be detained in custody, or the attorney or agent of such creditor or creditors, and to the other creditors named in the schedule of such prisoner, and resident within the united kingdom, and whose debts shall amount to the sum of 5*l.*, and to be inserted in the London Gazette, and also, if the said court shall think fit, in the Edinburgh and Dublin Gazettes, or either of them, and also in such other newspaper or newspapers as the said court shall direct."

Sections 40, 41, and 42, are re-enacted in the same words in ss. 69, 70, and 71 of the 1 & 2 Vict. c. 110.

1838.

READ v. CROFT.

The plaintiff might have replied, if the fact were so, that this debt was not inserted. The difficulty I feel, is, that it is sought by this mode of replying to make this court a court of appeal, to determine whether or not the insolvent debtors court have properly discharged the defendant.] It would appear by the 60th section that the due service of notice is a condition precedent to the availability of the discharge.

TINDAL, C. J.—The 42nd section of the 7 Geo. 4, c. 57, is directory to the court for the relief of insolvent debtors: the complying with those directions is not a condition precedent to the insolvent's discharge; and by the 46th section (14), the discharge is declared to operate "as to the several debts and sums of money due or claimed to be due at the time of filing the petition from the prisoner to the several persons named in his schedule as creditors, or claiming to be creditors for the same respectively, or for which such persons should have given credit to such prisoner before the time of filing such petition, and which were not then payable, and as to the claims of all other persons not known to such prisoner at the time of the adjudication, who might be indorsees or holders of any negotiable security set forth in the schedule." The replication here does not allege that the debt in respect of which this action is brought was not inserted in the defendant's schedule: and it scarcely even denies knowledge; it merely states that the plaintiff was not served personally with a notice of the filing of the defendant's petition.

Humfrey prayed leave to amend.

Granted.

(14) Section 75 of the 1 & 2 Vict. c. 110.

1838.

Wednesday, Nov. 14th.

INGRAM *v.* LAWSON.

To an action for a libel asserting that the plaintiff's vessel (which was advertised to convey passengers and freight to India) was unseaworthy, and had been sold to the jews to take out convicts, the defendant put in a plea justifying the charge of unseaworthiness:—Held, bad on demurrer, inasmuch as it left unanswered a material part of the charge.

THIS was an action on the case for a libel published in The Times newspaper.

The declaration stated, that, before and at the time of the committing of the grievances thereinafter mentioned, the plaintiff was a master mariner and ship-owner, and then and thenceforth hitherto carried on and exercised the business and occupation of a master mariner and ship-owner, and then and thenceforth hitherto was the owner of a certain ship called the Larkins, and the master and commander thereof, and then had made divers voyages in and with the said ship, and as her master and commander, and in the way of his said business and occupation, and with goods and passengers, to wit, from London to Calcutta in the East Indies, and from Calcutta aforesaid to London, and to and from divers other places; that, before and at the time of the committing of the said grievances, the plaintiff so being such master mariner and ship-owner, and master and commander and owner of the said ship as aforesaid, and the said ship then being at a certain place near to London, to wit, in the East India Docks, intended and was about to sail in a short space of time, to wit, within three months, in and with the said ship from the said place to Madras in the East Indies and Calcutta aforesaid; and the plaintiff before and at the time of the committing of the said grievances was desirous of procuring goods on freight and passengers of respectability to be by him conveyed in and on board the said ship on the said intended voyage, for reasonable reward in that behalf, and in the way of his said business and occupation; that the plaintiff, before and at the time of the committing of the said grievances, and in consequence of such his desire, had caused to be transmitted for insertion, to wit, by the defendant, in a certain newspaper whereof the defendant then and

1838.

INGRAM v. LAWSON.

thenceforth was the printer and publisher, and for reasonable reward in that behalf, a certain advertisement, containing therein as follows (that is to say)—"For Madras and Calcutta. Will sail on the 28th December, the well known fast-sailing teak ship Larkins, 700 tons, Charles Ingram, H.C.S., Commander; lying in the East India Docks. This ship has excellent accommodation for passengers, and carries an experienced surgeon. For freight or passage, apply to the commander, at the Jerusalem Coffee-House, or to T. Haviside & Co., Sun Court, or 69, Cornhill"—which advertisement was afterwards, to wit, on &c. inserted and published, to wit, by the defendant, to wit, in the first column of the newspaper called "The Times," on &c. last aforesaid, by the defendant, as thereinafter mentioned; that the plaintiff, had always conducted himself, as well in the way of his said business and occupation, as otherwise, with skill, care, judgment, and integrity, and had never been guilty, nor until the committing of the said grievances been suspected to have been guilty of endeavouring to procure goods on freight or passengers for an unseaworthy ship, nor of sending or intending to send to sea with goods and passengers a ship unfit for such purposes, or of any other the misconduct thereinafter mentioned to have been imputed to him; that the said ship, before and at the time of the committing of the said grievances, was a good seaworthy ship, fit and proper for the reception and conveyance on the said intended voyage of goods on freight and of passengers of respectability, and was not, nor until the committing of the said grievances was it suspected or believed that the said ship was sold to jews, to take out convicts, or unseaworthy, or unfit in any respect for the reception and conveyance on the said intended voyage of goods on freight and passengers of respectability: yet the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff in his credit and reputation, and in his said occupation and

1838.

INGRAM v. LAWSON.

business, and to cause it to be suspected and believed that the said ship was unseaworthy, and was unfit for the reception and conveyance on the said intended voyage of goods on freight and passengers of respectability; and that the plaintiff, so being such ship-owner and master mariner as aforesaid, was guilty of endeavouring to procure goods on freight and passengers of respectability for a ship unfit for such purposes, and of other the misconduct thereinafter mentioned to have been imputed to him, and to vex, harrass, oppress, impoverish, and ruin the plaintiff, before the commencement of the suit, to wit, on &c., wrongfully, maliciously, and injuriously published of and concerning the plaintiff, and of and concerning him in the way of and in respect of his said business and occupation, and of and concerning the said ship, and the said intended voyage, to wit, in the form of a letter, in a certain part, to wit, the fifth column of a certain newspaper then published by the defendant, to wit, a newspaper called "The Times," a certain false, scandalous, malicious, and defamatory libel of and concerning the plaintiff, and of and concerning the plaintiff in the way and in respect of his said business, and occupation, and of and concerning the said ship, and the said intended voyage, containing therein the false, scandalous, malicious, defamatory and libellous matter following of and concerning the plaintiff, and of and concerning the plaintiff in the way and in respect of his said business and occupation, and of and concerning the said ship and the said intended voyage, that is to say—"To the Editor of The Times. Sir,—I think no apology necessary for troubling you with the following statement. I have but one motive in giving publicity to the communication. I overheard a servant on our establishment remark to one of his fellow servants that his old ship (meaning thereby the said ship of the plaintiff) had returned to England at last; but that the captain had been forced to put in at the Cape, and procure twenty additional hands to pump the

Libel.

1838.

INGRAM v. LAWSON.

ship, to enable her to complete her passage: but he understood the jews had bought her (thereby meaning the said ship of the plaintiff) to take out convicts. With the recollection of the dreadful loss of life which in several instances has occurred from ships not seaworthy being employed for such purposes, I was induced to question the man; and learn that the ship's name is the Larkins (thereby meaning the said ship of the plaintiff.) I think the captain's name is Ingram, late in the East India Company's service (thereby meaning the plaintiff). He tells me the voyage before last, when he was on board, they were obliged to pump every two hours all the way from Calcutta; and on this last voyage, she (meaning the said ship of the plaintiff) was constrained to obtain the additional hands I have stated, to keep the ship afloat: but she (thereby meaning the said ship) is now purchased by some jews, for the purpose I have stated. I feel it my duty to give this publicity to it. I give you the statement as I heard it. I know nothing of the parties; and, as I have before remarked, I have but one motive, viz. the possible prevention of the recurrence of some fearful calamity. I am, Sir, your obedient servant, W. T.:" By means whereof the plaintiff had been and was greatly prejudiced and injured in his credit and reputation, and as such ship-owner and master mariner as aforesaid, and brought into public scandal and disgrace; and it had been and was suspected and believed that his said ship, for which he was so desirous as aforesaid to obtain goods on freight and passengers of respectability on the said intended voyage, was unfit for that purpose, and that he had conducted himself dishonestly and improperly in relation to the said intended voyage; and had been greatly vexed, harrassed, oppressed, and impoverished, and greatly hindred and prevented in and from obtaining goods on freight and passengers of respectablity on the intended voyage for his said ship, and had also lost and been deprived of divers great gains and profits which might and

Damage.

1838.

INGRAM v. LAWSON.

otherwise would have arisen and accrued to him in his said business and occupation, and had been and was otherwise much injured and damnified.

The defendant pleaded (to the whole declaration), amongst other things—That therefore, and before the publication of the said supposed libel in the declaration mentioned, to wit, on &c., the said ship called the Larkins in the declaration mentioned, sailed and proceeded from Calcutta, in the East Indies, on a voyage to England, and afterwards, to wit, on &c., arrived in England aforesaid, and that, during the whole of the said voyage, the said ship was so leaky that it became and was constantly necessary to pump out the water which entered and came into her in consequence of the leaky state of the said ship, and the same was accordingly pumped out at short intervals of time, to wit, every two hours during the said voyage, in order to keep the said ship afloat; that afterwards, and before the publication of the said supposed libel, to wit, on &c., the said ship sailed and proceeded from Calcutta aforesaid on another voyage to England aforesaid, and afterwards, to wit, on &c., arrived in England aforesaid, and that, during the whole of the said last-mentioned voyage the said ship was in so leaky a state that it became and was necessary to pump out divers large quantities of water which entered and came into her in consequence of the leaky state of the said ship, and the same were accordingly pumped out at divers short intervals of time; that the said ship, in the course of the last-mentioned voyage, afterwards, to wit, on &c., arrived at a certain port or place in parts beyond the seas, to wit, the Cape of Good Hope, and, upon such her arrival at the port or place last aforesaid, coutinued and was so leaky, and made so much water, that, in order to pump out the said water, and keep the said ship afloat until the determination of the last-mentioned voyage, it became and was necessary to hire, procure, and ship, and the master of the said ship for the

Third plea.

1838.

INGRAM v. LAWSON.

time being did then and there, to wit, at the port or place last aforesaid, hire, procure, and ship divers, to wit, twenty additional hands in and on board of the said ship; that afterwards, and before the said time when &c., to wit, on &c., one William Tyler sent to the then editor of the said newspaper in the declaration mentioned, and the said editor then received, a certain letter addressed to the said editor, and containing therein the supposed false, scandalous, defamatory, and libellous matter set forth in the declaration; and that the said ship in the said supposed libel mentioned and the said ship in the plea mentioned were and are one and the same ship, and not other or different, and the two voyages mentioned in the said supposed libel to have been performed by the said ship, and the said two voyages in the plea mentioned, were the same two voyages, and not other or different: wherefore &c.—verification.

Special demurrer.

To this plea the plaintiff demurred specially, assigning for causes—that the plea, though pleaded to the whole action, disclosed no answer or defence as to a material part of the libel above complained of, that is to say, as to so much of the said libel as imputed that the said ship was unseaworthy at the time of the said publication, and with reference to the said intended voyage, and *that she had been sold to jews to take out convicts*, nor as to any of the matters of the said libel save as to such as were alleged to have occurred during the said two preceding voyages—that the plea was double and multifarious, in this, to wit, that it not only asserted the truth of certain matters of the said libel, but also alleged that the said William Tyler sent, and the said editor received, the said letter in the plea mentioned; and that the plea attempted to set up two distinct grounds of defence, that is to say, a justification on account of the cause of publication, and a justification by averring the truth of the matters of the libel—that the plea amounted to the plea of not guilty,

1838.

INGRAM v. LAWSON.

and was argumentative—that it made allegations which were averments of evidence, and not of facts, and involving matter of law, and not fact—that it concluded with a verification, whereas it ought to have concluded to the country—that, though it did not aver the truth of all the material matters of the libel, it did not deny that the same libel was published wrongfully, maliciously, and injuriously, as stated in the declaration—that the plea contained irrelevant and superfluous matter, to wit, so much of the same plea as alleged the sending by Tyler and the receiving by the said editor of the letter in the plea mentioned, as therein alleged—that, on the plea as above pleaded, no single, sufficient, and pertinent issue could be joined—and that the plea was in other respects informal, uncertain, and insufficient. Joinder.

Henderson, in support of the demurrer, was stopped by the court—*Tindal*, C. J., observing that the plea, though professing to be an answer to the entire libel, left uncovered a material part.

Humfrey, in support of the plea.—The plea justifies all that is libellous in the letter, viz. that the ship was unseaworthy, and kept afloat only by labouring at the pumps. All that is left unanswered, is, the statement that the vessel had been sold to the jews to take out convicts; and there is no allegation in the declaration that that statement imports anything libellous. No special damage is assigned.

TINDAL, C. J.—It is not necessary to assign for special damage that which is the natural and unavoidable result of the libel. To say of a ship seeking passengers, that she is chartered to take out convicts, is clearly libellous.

The rest of the court concurring—

Judgment for the plaintiff.

1838.

Thursday, Nov. 15th.

A gentleman articled to an attorney quitted the service about the middle of the term, and went to the office of another attorney, to whom he was assigned. A fortnight having elapsed between the time of the clerk's quitting the former attorney and the execution of the assignment, though the service continued without interval—the Examiners declined to examine him:—The court intimated an opinion that the examination should be taken de bene esse.

Ex parte MASTERMAN.

MR. MASTERMAN was articled to an attorney, and, after the expiration of about three years of the term, was assigned to another; the assignment having relation to the day on which the clerk removed from the one office to the other, but not having been actually executed until a fortnight afterwards. Under these circumstances, the Examiners declined to examine him without the direction of one of the courts, conceiving the service to have been incomplete.

Kelly now moved for an order to that effect.—He submitted that the service was sufficient (15). [*Tindal*, C. J. What authority has this court to interfere? We do not even know that the gentleman, if examined and passed, will come here to be admitted.] The Examiners are appointed by, and of course are subject to the control of each and every of the courts. [*Bosanquet*, J.—The examination by the Examiners is virtually an examination by the court.]

TINDAL, C. J.—Without giving any opinion as to the sufficiency of the service, it is enough to say that we think the applicant should be examined de bene esse; the objection may be taken when he applies to be admitted: or, the Examiners may refuse to grant him a certificate; when he may under the 3rd rule (Hilary Term, 6 Will. 4,) present a petition by way of appeal to the judges (16).

(15) See Ex parte Rowle, 2 Chit. 61; Ex parte Matthews, 1 B. & Ad. 160; Ex parte Hubbard, 1 Dowl. 438; Ex parte Frost, 3 Dowl. 322.

(16) This course, it would seem, is hardly applicable to a case like the present: the certificate being a certificate of "fitness and capacity to act as an attorney," and not of due service under the articles. See the rules, 3 Scott, 1.

1838.

Thursday, Nov. 15th.

WATSON *v.* REEVE and Another.

A cause standing seventh in the paper (three of the preceding causes being marked "withdrawn," and the other three between the same parties) was called on at 11 o'clock in the morning. The defendants' attorney had not instructed counsel; but one of the defendants (a sheriff's officer) was in court at the time, and made no objection to the cause proceeding. A verdict having been found for the plaintiff for 7*l.*, the court refused to grant a new trial, even on the terms of costs being paid by the defendants' attorney.

THIS was an action of trover for a gun. The cause stood seventh in the paper for the sittings at Westminster on Saturday, the 11th instant. The defendants' attorney having consulted counsel as to the evidence necessary to establish his clients' defence, and seeing the state of the cause list, did not think it necessary to deliver the brief until eleven o'clock in the morning, when he proceeded to the court, and found that the cause had been taken as undefended about twenty minutes before his arrival.

Gray, upon an affidavit of these facts, and swearing to merits, moved for a rule nisi for a new trial, on payment of costs.—In *De Roufigny* v. *Peale*, 3 Taunt. 484, the cause stood *first* in the cause-paper for trial at a sitting in term; when the cause was called on, the defendant's attorney had delivered no brief to his counsel, although he had had a consultation with him the preceding night; and the cause being thus undefended, a verdict passed for the plaintiff. Soon after the verdict had been recorded, the defendant's attorney came into court with a brief to instruct counsel. Upon a motion for a new trial, the court said "that it would be only encouraging the negligence of attornies, to grant such an indulgence in the ordinary way, at the client's expense: attornies ought to know that they are amenable to their clients for the consequences of such neglect; neither would it be putting the plaintiff in the same situation if they were to grant the rule on the payment of costs between party and party:" and they granted a rule nisi (which on a subsequent day was made absolute) for a new trial, upon payment by the defendant's attorney, out of his own pocket, of all costs as between attorney and client. [*Bosanquet*, J., referred to *Gwilt* v. *Crawley*, 8 Bing. 144, 1 M. & Scott, 229. There, the de-

1838.

WATSON v. REEVE.

fendant's attorney had notice on the 26th November that his cause was set down for trial; five days afterwards it was called on and tried as an undefended cause, no one appearing for the defendant: the defendant's attorney having on the day of trial delivered no briefs—this court refused to grant a new taial upon any terms.] It did not appear in that case that the defendant's attorney had examined witnesses, or taken any other steps towards the defence of the action: here it does.

THE COURT granted a rule with considerable hesitation and reluctance; TINDAL, C. J., observing that it was a case of very gross negligence on the part of the attorney, and that the rule could only be allowed to go on the same terms as that in *De Roufigny* v. *Peale*, and that it must not be put in the new trial paper, but come on as a motion.

Humfrey now shewed cause, upon an affidavit stating, that, of the six causes that stood in the paper before the cause in question, three were marked "withdrawn," and the other three were actions between the same parties, and when called on verdicts passed in them by consent; that, when this cause was called on, and during the whole course of the plaintiff's case, one of the defendants (a sheriff's officer, and therefore not likely to be unconversant with the business of a suit,) was in court, and made no objection to the cause proceeding. In *Gwilt* v. *Crawley*, Tindal, C. J., says: "It would be gross injustice to the plaintiffs if we were to listen to the application, as it would enable defendants to lie by, and, after learning the particulars of the plaintiff's case, to harass him with a new trial and evidence got up in answer." Not only would the granting a new trial in this case be an act of injustice to the plaintiff; but the refusing it will be an act of humanity to the defendants, the verdict being only for 7*l.*; besides

that it would establish a mischievous precedent, and hold out a bonus for the encouragement of a negligent and highly reprehensible practice.

Gray, in support of the rule.—This rule was granted upon a full statement of the facts, and after reference to the only cases that have been cited: those facts standing unaltered, and all the expense incident to the motion having been incurred, the court will not now render that expense abortive by discharging the rule! The amount of the verdict is wholly immaterial: the rule that precludes the granting of a new trial where the verdict on the first trial is for less than 20*l.*, applies only to the case of a verdict against evidence, and not to a case like this.

TINDAL, C. J.—I am of opinion that this rule ought to be discharged. Had we known when the rule was moved for that the verdict was for so small a sum as 7*l.*, we should not have felt disposed to grant it. The present is obnoxious to all the objections that can apply in such cases. One of the defendants, who from his situation in life was likely to know how to turn to account any information thus acquired, was present in court, and heard the whole of the plaintiff's case gone through. Upon a future trial, the parties would under the circumstances hardly meet on equal terms.

VAUGHAN, J.—Were we to make this rule absolute, we should be holding out a premium for negligence. It is clearly not a case for favour. Le jeu ne vaut pas la chandelle.

The rest of the court concurring—

Rule discharged.

1838.

Thursday, Nov. 15th.

A vessel lying at Pembroke was chartered on a voyage from Cardiff to Alexandria with a cargo of coals and iron, to be shipped at Cardiff; forty running days to be allowed the merchant for loading at Cardiff and unloading at Alexandria—to commence on the 16th December. At the request of the plaintiffs, the defendant consented to the coals being put on board at Pembroke instead of at Cardiff:—Held, that the days thus consumed at Pembroke after the 16th December, were to be reckoned as part of the forty lay days.

JACKSON and Another *v.* GALLOWAY.

THIS was an action of assumpsit. The first count of the declaration stated, that, on the 2nd December, 1834, by a charterparty made between certain persons trading under the firm of G. L. Jackson & Sons, on behalf of the owners of the ship called The City of Rochester, then lying at Pembroke, and the defendant, charterer of the said ship, it was mutually agreed that the ship should, with all convenient speed, proceed to Cardiff, and there receive a cargo of coals and iron, and proceed therewith to Alexandria, and deliver the same on payment of freight, &c.—forty running days to be allowed the said merchant, if the ship were not sooner dispatched, for loading the ship at Cardiff and unloading at Alexandria, to commence on the 16th then instant (December), cease when loaded and dispatched, recommence on arrival at Alexandria, and finally cease when unloaded: ten days on demurrage, over and above the said laying days, at 7*l.* per day. The count then averred, that, the said charterparty being so made as aforesaid, afterwards, to wit, on &c., in consideration &c. [mutual promises]; that, after the making the promise of the defendant, to wit, on the 2nd December, 1834, the ship, being then at Pembroke, by and with the consent of the plaintiffs and the defendant, and at the request of the defendant, remained at Pembroke for the purpose of receiving on board a certain quantity of coals, part of her cargo for the intended voyage, in lieu and instead of the ship being loaded with such coal as aforesaid at Cardiff, as in the charterparty mentioned: that the ship did, with the consent and at the request of the defendant as aforesaid, receive on board at Pembroke divers large quantities of coal as aforesaid, and, in so doing, and without any default or neglect on the part of the plaintiffs in that behalf, was for the purpose aforesaid kept and detained by

1838.

JACKSON v. GALLOWAY.

the defendant at Pembroke from the day and year last aforesaid until the 17th December; that the defendant did dispense with and discharge the plaintiffs from performing that part of the charterparty which related to the sailing of the ship with all convenient speed, as in the charterparty mentioned, from Pembroke to Cardiff up to and until the time the ship had finished and completed the loading of the coals on board thereof at Pembroke; that, being so loaded, afterwards, to wit, on the day and year last aforesaid, the ship did with all convenient speed proceed and sail to Cardiff, and afterwards, to wit, on the 18th January, 1835, arrived at Cardiff, and was then ready to receive, and did receive on board the residue of the cargo in the charterparty mentioned; and afterwards, to wit, on the 2nd February, 1835, the loading being then completed, and the ship ready to proceed on her voyage (of which the defendant had notice), the defendant, not regarding his promise, kept and detained her at Cardiff for the space of twenty days over and above the lay days and the ten days of demurrage in the charterparty mentioned; whereby the plaintiffs were put to great cost &c., to wit, &c., in and about the maintaining the master and mariners of the said ship for the said period, and lost and were deprived of the use of the ship and all profit thereof for the period aforesaid; and whereby a large sum, to wit, &c., became due and payable to the plaintiffs for the said demurrage at Cardiff for the days of demurrage in the charterparty mentioned: that the ship afterwards, to wit, on the 19th of February in the year last aforesaid, being fully laden and dispatched by the defendant, proceeded with the cargo on board to Alexandria, and afterwards, to wit, on the 10th July in the year last aforesaid, arrived there, and afterwards, to wit, on the 13th July in the year last aforesaid, was ready to unload her cargo, of which the defendant had notice; that the defendant, further disregarding his promise, kept and detained the ship after

Sailed for Alexandria.

Arrival.

1838.

JACKSON v. GALLOWAY.

she was so ready to unload as last aforesaid, and after such notice as last aforesaid, a further space of time, to wit, thirty days over and above the lay days and the ten days of demurrage in the charterparty mentioned, whereby the plaintiff was put to further cost &c.; and that the defendant, further disregarding his promise, did not nor would pay the plaintiffs the freight and primage, or the sum due for the demurrage of the ship at Cardiff.

There was a second count upon the charterparty (which was withdrawn), and also counts for freight, for the use and hire of the vessel, for money paid, and for money found due upon an account stated.

The defendant pleaded non assumpsit to the whole declaration, and to the first count the following pleas—2. As far as related to the claim for demurrage, that the defendant did not consent and request that the ship should remain at Pembroke—3. That the ship was not detained or kept by the defendant at Pembroke for the purpose in the count mentioned—4. That the defendant did not dispense with or discharge the plaintiffs from performing that part of the charterparty which related to the sailing of the ship with all convenient speed from Pembroke to Cardiff, up to and until the ship had finished and completed the loading of the coals on board at Pembroke—5. That the ship, being so loaded with coals, did not with all convenient speed sail and proceed to Cardiff—6. That the ship was not at Cardiff on the 10th January, 1835, ready to receive on board the residue of the cargo from the factors of the defendant—7. That the defendant did not detain or keep the ship at Cardiff any part of the time over and above the lay days and the ten days of demurrage—8. As to the keeping and detention of the ship at Alexandria, that the defendant did not keep or detain the ship after she was ready to unload the cargo, and after notice, over and above the lay days and days of demurrage.

1838.

JACKSON v. GALLOWAY.

Ninth plea.

9. As to the demurrage—so far as the same related to the running days to be allowed for loading the ship at Cardiff, and for unloading at Alexandria—that, before the arrival of the ship at Cardiff, disputes arose between the plaintiffs and defendant as to the time from which the running days were to commence, and the defendant, on several occasions before the arrival of the ship at Cardiff, expressed to the plaintiffs his doubts as to the propriety of a particular day being specified in the charterparty as the period from whence the running days were to commence; and thereupon, afterwards, and before the arrival of the ship at Cardiff, to wit, on the 14th December, 1834, it was mutually agreed by and between the plaintiffs and defendant, that, in order that the defendant's objections might be removed, the terms of the charterparty as to the time when the running days were to commence should be altered by inserting in the charterparty, after the words "to commence on the 16th instant," the following words, "or three days after the ship's arrival at Cardiff," and the plaintiffs then, in pursuance of that agreement, altered the terms of the charterparty as to the time when the running days were to commence, by inserting in the part of the charterparty signed by G. L. Jackson & Sons on behalf of the plaintiffs, after the words, "to commence on the 16th instant," the following words, "or three days after the ship's arrival at Cardiff;" and the plaintiffs then accepted the charterparty so altered in substitution and satisfaction of and for the charterparty in the first count mentioned: that the ship did not arrive at Cardiff until the 9th January, 1835; and that the defendant loaded her at Cardiff, and afterwards unloaded at Alexandria, and did not detain the ship beyond the space of forty running days calculated upon the terms last aforesaid.

The plaintiffs joined issue on the first eight pleas, and replied de injuriâ to the ninth.

The cause was tried before Tindal, C. J., at the sit-

1838.

JACKSON v. GALLOWAY.

tings in London after last Hilary Term. The facts that appeared in evidence were as follow:—The vessel was at Pembroke on the 2nd December, 1834, when the charterparty was made, unloading a cargo of timber, which was not all discharged until the 16th. She remained there till the 26th, taking in coals for her outward cargo. On that day she sailed for Cardiff, where, owing to the bad weather she encountered, she did not arrive until the 10th January, 1835. At Cardiff she remained till the 19th February—forty days—taking in iron. She then sailed for Alexandria, where she arrived on the 10th July, and was detained other ten days. The plaintiffs claimed for ten days' demurrage beyond the ten days stipulated for by the charparty at 7*l.* per day.

On the part of the defendant, it was contended that he ought not to be charged for the days between the 16th and 26th December, which were consumed in taking in the coals at Pembroke, at the request, it was suggested, and for the convenience of the plaintiffs, who would otherwise have been obliged to take in a quantity of ballast. It was ultimately left to the jury, upon conflicting evidence, and a lengthened correspondence between the parties and their agents, to say whether or not the defendant consented to the loading of the coals at Pembroke instead of Cardiff.

The jury found that the coals were so loaded at the request of the plaintiffs, and with the consent of the defendant; and that the ship had been detained in the whole twenty days over and above the forty lay days—for which they returned a verdict for the plaintiffs for 170*l.*, being ten days at 7*l.* per day, pursuant to the terms of the charterparty, and ten days at 10*l.* per day.

Talfourd, Serjeant, in Easter Term last, obtained, a rule nisi to reduce the damages.—He submitted, that, as to the ten days at Pembroke, the evidence did not support

the issue; the declaration alleging that the loading there took place at the *request of the defendant*, and the evidence being that it was at the *request of the plaintiffs*, the defendant merely *assenting*.

Wilde, Serjeant, shewed cause.—The question was properly left to the jury; and, after their finding, it must be assumed that Pembroke was by the mutual consent of the parties to be taken as substituted for Cardiff in the charterparty as the place for loading the coals. Whether the request for this substitution proceeded from the one party or the other, was wholly immaterial; and the charterparty would remain unaltered in all other respects.

Talfourd, Serjeant, and *R. V. Richards*, in support of the rule.—There was no evidence whence the jury were warranted in engrafting on the original contract an agreement to pay demurrage for the days the ship was detained at Pembroke taking in cargo.

TINDAL, C. J.—The question is whether upon the whole the jury have done wrong in assessing the damages in this case at 170*l*. The charterparty was for a voyage from Cardiff to Alexandria, with a cargo of coals and iron; the vessel to be allowed forty running days for loading at Cardiff and unloading at Alexandria, and ten days further on demurrage at 7*l*. per day—the time to commence on the 16th December: and the question is, whether, after the contract was so entered into, the terms of it have been varied by any subsequent agreement of the parties, and, if so, to what extent. It appears that, after the making of the charterparty, the place of loading of the coals was changed from Cardiff to Pembroke, at the request of the plaintiffs, and with the assent of the defendant. On the part of the defendant it has been contended that this was no alteration of the original contract, but only a request

1838.

JACKSON v. GALLOWAY.

on the one side and a consent on the other; and that such was the express finding of the jury. I confess I am unable to see any distinction between such a state of things, and a substitution of one contract for another. Every agreement consists of a proposal on the one side and an assent on the other. It appears to me, that, after the charterparty was entered into, and whilst the ship remained at Pembroke, a new agreement was come to by the parties, varying the written charterparty to a certain extent, viz., substituting Pembroke for Cardiff as the port at which the coals were to be taken on board. Then comes the question whether or not the ship-owner was entitled to reckon in the lay days the days the vessel was employed in taking in coals at Pembroke. The defendant contends that this partial substitution or alteration of the contract did not carry with it a right to the ship-owner to calculate the lay days from the commencement of the ship's loading at Pembroke; and that I ought so to have directed the jury. But it appeared to me that the mere substitution of Pembroke for Cardiff as the port of loading for the coals, made no alteration in the rest of the charterparty, but left the rest of the stipulations to be carried into effect as nearly as might be according to the terms of the instrument. In the case of building contracts it is every day's experience that variations are made in minute particulars; and nobody ever dreamt that such contracts would be thereby vacated. It seems to me that the 16th December continued to be the day from which the lay days were to be reckoned. I think the jury did right in allowing the ten days demurrage for the ship's detention at Pembroke. With regard to the days at Cardiff, there was no question at the trial, except as to whether they were to be reckoned from the 10th or the 12th January; which was a question for the jury (a special jury) upon the evidence before them. Upon the whole, I see no reason for dissenting from the verdict; and therefore I think the rule should be discharged.

1838.

JACKSON v. GALLOWAY.

VAUGHAN, J.—I am of the same opinion. The parties having agreed to substitute Pembroke as the place at which the coals were to be put on board, instead of Cardiff, the contract between them was so far varied, but no further. There can be no reason why the lay days should not be reckoned from the 16th December, as provided by the charter-party. The question was one peculiarly for the jury.

BOSANQUET, J.—Whether the plaintiffs are to recover on the special or on the general count, it is not necessary for us now to discuss; that will be a question for his lordship, who will direct the verdict to be entered according to his notes, upon a proper application to him for that purpose. It is said that the jury have not found an agreement for the substitution of Pembroke for Cardiff; but merely that there was a request to that effect by the plaintiffs, assented to by the defendant. That, I apprehend, is what Coke calls aggregatio mentium. The substitution of Pembroke for Cardiff, as the place of loading for the coals, must necessarily carry with it the substitution of Pembroke as the place at which the lay days were to commence.

COLTMAN, J.—I am also of opinion that the principle upon which the jury have estimated the damages in this case is the correct one. The principal contention between the parties has been as to the plaintiffs' right to charge demurrage for the ten days the vessel was at Pembroke after the 16th December. It seems to me it would be a strong thing, in the absence of any stipulation to that effect, to say that those days are to be excluded from the computation, by reason of the alteration in the place of loading. It does not appear to me that there was anything wrong either in the manner in which the question was submitted to the jury, or in their mode of dealing with it.

Rule discharged.

1838.

Friday, Nov. 16th.

Where a pawnbroker is guilty of a violation of the statute 39 & 40 Geo. 3, c. 99, s. 6, by omitting to make the entries or to insert in the duplicates the result of the inquiries therein directed to be made, the contract of pledge is altogether avoided.

No lien is acquired by the pawnbroker under a contract so made.

FERGUSSON and Another, Assignees of W. H. BULLOCK, a Bankrupt, *v.* NORMAN.

THIS was an action of trover brought by the plaintiffs, assignees of William Henry Bullock, a bankrupt, to recover the value of certain goods, alleged in the first count to be the property of the bankrupt, and in the second that of the plaintiffs as his assignees. The defendant pleaded, that the plaintiffs were not assignees of the estate and effects of Bullock modo et formâ, and not guilty to each count; on each of which pleas issue was joined. A summons had been taken out by the defendant to amend his pleas, but was discharged on the plaintiffs undertaking not to object to the defendant's offering evidence of a lien upon the record as framed: and by an order of Nisi Prius (afterwards made a rule of court), the cause was referred to a barrister—who was to assess the damages, and find the value of the goods alleged to have been converted by the defendant (the goods which had been sold being considered of the value of the produce of such sale), and to be at liberty to direct the goods that remained unsold to be delivered up, or to assess damages in respect thereof, in the event of a judgment being entered for the plaintiffs: and it was further ordered, that the parties should produce before the arbitrator all such books, deeds, papers, and writings, notes, and memorandums in writing, in their or either of their custody or power, relating to the matters in difference, as the arbitrator should require; that the arbitrator should state the facts which should be substantiated in evidence before him specially upon his award, for the information of the court, that the court might direct whether the verdict then entered for the plaintiffs should stand, or whether a nonsuit should be entered; that the award of the arbitration should be stated in the form of a special case, and that either party should be at

1838.

FERGUSSON v. NORMAN.

liberty to turn it into a special verdict; that, if any alteration in the case should be necessary, to enable the special verdict to be properly framed, the inferences and results necessary for that purpose should be stated by the arbitrator from the notes of the evidence taken before him; that the order should be for such purpose a continuing power to the arbitrator, although he might have made his award in the form of a special case as aforesaid; that the arbitrator should have power to make another award in the form of a special verdict for the purpose aforesaid, and such special verdict should be entered on the postea as if the same had been found by the jury; and that the costs of the suit and of the reference and award should be costs in the cause, and abide the event thereof.

The arbitrator made his award, stating the following facts:—

Award.

"The plaintiffs were the assignees of the estate and effects of William Henry Bullock, a bankrupt, under a fiat which issued on the 8th February, 1834, upon an act of bankruptcy committed on the 27th January, 1834. The bankrupt, William Henry Bullock, carried on the business of a tailor, and, from the 1st November, 1831, to the 29th September, 1832, resided at No. 5, South Place, Pimlico, and, from the 29th September, 1832, to the time of his bankruptcy, at No. 56, Rupert Street, Haymarket. While living at both these places the bankrupt was a housekeeper. Pimlico is the out ward of Saint George, Hanover Square, and embraces a district about four miles round. It is very populous, and contains many streets, houses, places, courts, and squares. The defendant is a pawnbroker, living at No. 51, Prince's Street, Leicester Square, where he had carried on that business for some years previous to the 1st November, 1831, and from thence to the present time. Between the 1st November, 1831, and the 27th November, 1833, the bankrupt himself upon different occasions, amounting altogether to one hundred and forty-two,

1838.

FERGUSSON v. NORMAN.

pledged with the defendant *as a pawnbroker*, various articles of property, in some few cases for more than 5*s.* and not exceeding 10*s.*, but, in the great majority of cases, for more than 10*s.* Of these pledges sixty are now in the possession of the defendant; upon which the sum of 80*l.* 14*s.* 11*d.* has been advanced by the defendant, and are of the value of 100*l.*; and the remaining eighty-two, upon which the sum of 12*4l.* 10*s.* 5*d.* had been advanced by the defendant, have been sold from time to time after the expiration of a year from the time they were respectively pledged, and before the 27th November, 1833; such of them as were pledged for more than 10*s.* having been sold by auction; and were altogether of the value of 155*l.* 6*s.* 2*d.* The whole of the property so pledged belonged to the bankrupt.

Demand and refusal.

"On the 24th May, 1834, before the commencement of this action, the plaintiffs required the defendant todeliver the whole up to them, but which the defendant refused to do.

Defendant kept books.

"The defendant, pursuant to the statute 39 & 40 Geo. 3, c. 99, s. 6, kept separate books, some for the entry of pledges exceeding 5*s.* but not exceeding 10*s.*, and others for pledges above 10*s.*: in all the entries in these books, and also in the notes or duplicates given by the defendant to the bankrupt at the time of pledging, the defendant has in every instance inserted the name of Reeves as the name of the person by whom the goods were pledged. The name of the bankrupt no where appears. If the court should be of opinion that the plaintiffs were entitled to recover by reason of this misdescription, the arbitrator assessed their damages at the sum of 255*l.* 6*s.* 2*d.*

Name of "Reeves" inserted therein as the person pawning.

Statement of place of abode.

"In the statement of the place of abode of the owner of the goods pledged, the defendant has inserted 'Pimlico' only: this also occurs in every instance, both in the entries in the books, and also in the duplicates given to the bankrupt at the time of pledging." If the court should be of opinion that the plaintiffs were entitled to recover by reason

1838.

FERGUSSON v. NORMAN.

of this ground of objection, the arbitrator assessed their damages at the sum of 255*l.* 6*s.* 2*d.*

The arbitrator also found, as to the statement respecting the person pledging being a lodger or housekeeper, "that, in every case of the entry of a pledge in the defendant's books, the letter L is uniformly inserted, and not the letter H; except in nine cases where neither the letter L or H is inserted." If the court were of opinion that the plaintiffs were entitled to recover by reason of the insertion of the letter L in the books instead of the letter H, the arbitrator assessed the plaintiffs' damages at the sum of 25*l.* 6*d.* 7*d.*: and, if the plaintiffs were entitled to recover in the above nine cases where neither the letter L or H was inserted in the books, the arbitrator assessed the plaintiffs' damages at 3*l.* 19*s.* 7*d.*"

Description in the books.

The arbitrator also found, "that, among the duplicates given to the bankrupt at the time of making the pledge, there were fifty-five which had the letter L and not the letter H; and that the value of the property mentioned in the said duplicates was 105*l.*: and that there were also sixty-seven duplicates which had neither the letter L or H; and that the property specified in the last-mentioned duplicates was of the value of 74*l.* 4*s.* 6*d.*, upon which the sum of 64*l.* 6*s.* 9*d.* had been advanced by the defendant: part of which property, of the value of 60*l.* 3*s.* 6*d.*, had been sold, and the remainder, of the value of 14*l.* 1*s.*, remained in the defendant's possession. That, in seven of the above-mentioned nine cases, the duplicates bore the letter L, and the property so pledged was of the value of 3*l.* 0*s.* 7*d.*; and, in the remaining two cases, the two duplicates had neither the letter L or H, and the value of the property in these two instances was 19*s.*"

Description in the duplicates.

The arbitrator also found "that the bankrupt, on the 24th April, 1833, pledged some cloth for 10*s.* 1*d.*, which was not entered in the book kept for the entry of pledges above 10*s.*; and that the duplicate of this pledge given by

Omission to enter one pledge.

1838.

FERGUSSON v. NORMAN.

the defendant to the bankrupt bore no number, and he found the value of this cloth to be 10*s.* 5*d.*, and that it was still in the defendant's possession. And, if the court should be of opinion that the plaintiffs were entitled to recover in respect of this item, he assessed the damages in respect thereof at 10*s.* 5*d.*"

The case came on for argument in Trinity Term, 1837, when the court, thinking that it did not sufficiently appear on the face of the award whether or not the defendant, at the time of receiving the several pledges, had made the inquiries prescribed by the statute 39 & 40 Geo. 3, c. 99, s. 6, directed the matter to go back to the arbitrator for amendment in this particular. The rule for this purpose required the arbitrator "to inquire and state whether the defendant on any and which of the occasions of the pawnings in question in the cause did make inquiry as directed by the act of parliament referred to."

Further award

The arbitrator, having further examined and considered the several allegations and proofs of the parties respectively, in pursuance of the said rule of court, found and adjudged as follows:—

As to the inquiries made by defendant at the time of receiving the pledges.

"I find, that, before any money was lent or advanced upon any one of the said pawnings in the award mentioned, the defendant did inquire of the bankrupt, the party pawning, his name; and that he, the defendant, was told by the bankrupt that his name was Reeves. I also find, that, before any money was lent or advanced upon any one of the said pawnings in the award mentioned, the defendant did, in every instance, inquire of the bankrupt the name and place of abode of the owner of the said goods; and that the defendant was in all cases informed by the bankrupt that he resided at Pimlico: but, from the evidence brought before me, I am unable to find whether the defendant did or did not, in any one instance, make further inquiry of the bankrupt whether he resided in any street or other place in Pimlico, or

1838.

FERGUSSON v. NORMAN.

whether the said abode had any number, or otherwise inquire relating to the said name and place of abode. I also find that the defendant, before he lent or advanced any money, did in all cases except in two, where neither the letter L or H is inserted, either in the books or duplicates, inquire of the bankrupt whether he was a lodger or housekeeper; and that, in all those cases in which he made the inquiry, the bankrupt informed the defendant that he was a lodger: but, from the evidence brought before me, I am unable to find whether in the said two cases the defendant did or did not make any inquiry whether the bankrupt was a lodger or housekeeper."

This second finding being equally inconclusive and unsatisfactory, it was again, by rule of court of Michaelmas Term last, sent back to the arbitrator, with liberty to him to examine witnesses upon the point: whereupon he made the following further award:—

"That, before any money was lent or advanced upon any one of the pawnings in the award mentioned, the defendant did, upon every occasion of such pawnings, make the inquiry as directed by the statute, except in the two cases mentioned in the award, where neither the letter L or H appeared upon the duplicates, or was inserted in the entries in the books; that, in these two cases, the defendant did not inquire whether the person pawning was a lodger or housekeeper, as directed by the statute; and that the defendant was informed in every instance by the person pledging, that his name was Reeves, that he resided at Pimlico, but not in any street, place, or square, or house with a number, and also that he was a lodger, except in the two cases where no such inquiry was made."

Omission to inquire as to place of abode and description, confined to two instances.

The question for the opinion of the court was, whether, under the circumstances, the defendant had a lien upon the various articles mentioned in the award, or any of them, either as a pawnbroker or otherwise.

1838.

FERGUSSON v. NORMAN.

39 & 40 Geo. 3, c. 99, s. 6.

Barstow, for the plaintiffs.—The statute 39 & 40 Geo. 3, c. 99, s. 6, requires, amongst other things, "that all and *every person* and persons *who shall take by way of pawn* or pledge, of or from any person or persons whomsoever, *any goods* or chattels of what kind soever the same shall be, and whereon shall be lent any sum of money exceeding *5s.*, *shall* forthwith, and *before he*, she, or they *shall* or may *advance* or lend *any money upon such pawn* or pledge, *enter* or cause to be entered in a fair and regular manner, *in a book* to be kept by him, her, or them for that purpose, a description of the goods or chattels which he, she, or they shall receive in pawn, pledge, or exchange, and also the sum of money to be advanced or lent thereon, with the day of the month and year on which, and *the name of the person* or persons *by whom such goods* or chattels *are so pawned*, pledged, or exchanged, *and the name of the street and number of the house*, if the same shall be said to be numbered, *where such person shall abide*, and *whether such person* or persons *is* or are *a lodger in or the keeper of such house*, by using the letter L if a lodger, and the letter H if a housekeeper, and also the name and place of abode of the owner or owners of such goods and chattels, according to the information of the person pawning, pledging, or exchanging the same; *into all which circumstances the pawnbroker is thereby required to inquire of the party pawning, before any money shall be lent or advanced;* and, in all cases where the money lent on any such goods or chattels shall not exceed the sum of *5s.*, such entry shall be made in such book or books by all and every such person and persons so taking the same by way of pawn, pledge, or exchange as aforesaid, within four hours next after the goods and chattels shall have been so pawned, pledged, or exchanged as aforesaid; and every pledge upon which shall be lent any sum of money above 10*s.* shall be entered in the manner aforesaid in a book or books to be kept for that purpose, separate and

1838.

FERGUSSON v. NORMAN.

apart from all other pledges whatever; and every such entry of such pledge whereon shall be lent any sum of money exceeding 10*s.* shall be numbered in such book progressively as they are received in pawn, in the manner following, viz. the first pledge that is received in pawn in the month of September next shall be numbered No. 1, the second No. 2, and so on progressively until the end of the month; and the first pledge that is received in the next month shall be numbered No. 1, and the second No. 2, and so on progressively and in like manner until the end of the month; and the like regulation with respect to the numbers of all pledges above 10*s.* shall be observed in every succeeding month throughout the year; and upon every note or memorandum respecting any such pledge whereon shall be lent any sum exceeding 10*s.* as aforesaid, shall be fairly and legibly written or printed the number of the entry of such pledge so entered in such book or books as aforesaid: and every such person shall, at the time of the taking of every pawn, pledge, or exchange whatever, give to the person or persons so pawning, pledging, or exchanging the same, a note or memorandum fairly and legibly written or printed, or in part written and in part printed, containing therein in like manner a description of the goods and chattels which he, she, or they have received in pawn, pledge, or exchange, and also the sum of money advanced thereon, with the day of the month and year on which, and the name and place of abode, and number of the house, if said to be numbered, of the person or persons by whom such goods or chattels are so pawned, pledged, or exchanged, and whether such person is a lodger or housekeeper as aforesaid, by using the letter L if a lodger, and the letter H if a housekeeper, and also the name and place of abode of the owner or owners thereof, according to the information aforesaid."

Number of pledge.

The questions that will be raised in this case are two—first, whether or not the defendant has been guilty of a

1838.

FERGUSSON v. NORMAN.

violation of the duty cast upon him by the statute—secondly, whether, supposing he has been, he can have acquired any right of lien under the circumstances stated upon the face of the award.

1. Defendant guilty of a violation of the act.

1. The act requires the pawnbroker, before he makes any advance, to enter in a book the date of the transaction, the name of the pawner, the name of the street and number (if any) of the house where he resides, and the letter L or H to denote whether lodger or housekeeper, and makes it imperative on him to *inquire* into all these circumstances; it also requires that the ticket or duplicate given to the pawner shall contain the like particulars. The arbitrator finds, that, in nine cases, the entry in the defendant's book contained neither the letter L or H; and that, in seven of those cases, the duplicates bore the letter L, and in the other two neither letter. He further finds, that in sixty-seven other instances, the duplicates contained neither L or H: and he also finds, that, in one instance, property was pledged by the bankrupt for 10*s.* 1*d.*, and no entry thereof was made in the proper book; and that, in the duplicate given to the bankrupt on that occasion, the number was omitted. That the defendant has violated the provisions of the statute, therefore, is clear.

2. Consequence of such violation.

2. The question then is, what is the legal effect of a non-compliance with the requisitions of the act. It is true, the statute does not in terms state that the pawnbroker shall in such case forfeit all property in or lien upon the goods. It is true also that the statute imposes penalties (s. 26) for non-compliance with the prescribed regulations. Still, a violation of the law can never be the foundation of a claim of right. In *Bartlett* v. *Vinor*, Carth. 252, Lord Holt says that "every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a pro-

hibition, though there are no prohibitory words in the statute." And in the report of the same case in Skinner, 322, the court say, that, "in every case where a penalty is annexed to the doing of such an act, though it be not prohibited, yet, if such a thing appears upon the record to be the consideration, the agreement is void:" and, that, "in every case where the statute inflicts a penalty for doing such an act, though the act be not prohibited, yet the thing is unlawful." In *Law* v. *Hodson*, 11 East, 300, 2 Camp. 147, it was held, that the statute 17 Geo. 3, c. 42, which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller, if bricks be sold and delivered under the statutable size, the seller cannot recover the value of them. So, in *Bensley* v. *Bignold*, 5 B. & A. 335, it was held that a printer cannot recover for labour or materials used in printing any work, unless he affix his name to it, pursuant to the 39 Geo. 3, c. 79, s. 27. Abbott, C. J., there says: "I am of opinion that a party cannot be permitted to sue either for work and labour done or for materials provided, where the whole combined forms one entire subject-matter made in direct violation of the provisions of an act of parliament." And Holroyd, J., adds: "There does not appear to me to be any sound distinction between those cases where a statute requires a thing to be done, and where it prohibits it from being done." In *Wetherell* v. *Jones*, 3 B. & Ad. 221, it was held, that, where a contract which the plaintiff seeks to enforce is expressly or by implication forbidden by the statute or common law, no court will lend its assistance to give it effect. And the rule is clearly and conclusively laid down in *Forster* v. *Taylor*, 5 B. & Ad. 887, 3 N. & M. 244: by the 36 Geo. 3, c. 88, intituled "an act to prevent abuses and frauds in the packing, weight, and sale of butter," s. 2, every cooper or other person making a vessel for packing butter, is required to brand his Christian and surname on such vessel, together with the

1838.

FERGUSSON v. NORMAN.

exact weight or tare thereof, or, in default thereof, he is to forfeit for every such vessel not so marked 10*s.*; by s. 3, every dairyman, farmer, &c., who shall pack any butter for sale, shall pack the same in vessels so made and marked as aforesaid, and shall brand his Christian and surname on different parts of the vessel therein described, and on the butter contained in such vessel, upon penalty of forfeiting, for every default, 5*l.*: in an action brought by a farmer to recover the price of fifteen firkins of butter sold by him to the defendant, it appeared that the firkins were not marked according to the act: and it was held, that the provisions which require the vessel to be branded with the name of the cooper, seller, &c., being intended for the protection of the public against fraud, indirectly prohibited any sale of butter in vessels not properly marked; that the subject-matter of the contract was in such a state, from the vessels not being properly marked, that the sale of it was forbidden by act of parliament, and consequently that the contract of sale was void, and the plaintiff could not recover; and that, although there was a penalty imposed in the same clause of the act which directed the thing to be done, yet the remedy of the public against a person infringing the clause was not thereby limited to a proceeding for the penalty, but that the clause might be used against him as a defence to an action. In *Cope* v. *Rowlands*, 2 M. & W. 149, it was held that a broker cannot maintain an action for work and labour, and commission for buying and selling stock, &c., unless duly licensed by the mayor and aldermen of the city of London, pursuant to the 6 Anne, c. 16. Parke, B., in delivering the judgment of the court, there says: "It is perfectly settled, that, where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition—Lord

1838.

FERGUSSON v. NORMAN.

Holt, *Bartlett* v. *Vinor*, Carth. 252. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that, if *the contract* be rendered illegal, it can make no difference in point of law whether the statute which makes it so has in view the protection of the revenue or any other object. The sole question is, whether the statue *means to prohibit the contract.*" And in *Armstrong* v. *Armstrong*, 3 Mylne & K. 64, Lord Brougham, C., said: "If a person agrees with another to be a secret partner in the business of a pawnbroker, he agrees to do that which is illegal and punishable by the 39 & 40 Geo. 3, c. 99, an act containing provisions highly beneficial, and bringing the trade in question under regulations which are wholesome to the community, inasmuch as they prevent the abuse of such traffic; regulations which will never be objected to by the respectable part of the body concerned in carrying the trade on, and which only affect those whom the police ought to watch over."

It may be attempted on the part of the defendant, on the authority of *Fitzroy* v. *Gwillim*, 1 T. R. 153, to set up a distinction between the enforcing of a contract and a claim of lien. *Fitzroy* v. *Gwillim* is no longer considered law—*Wood* v. *Grimwood*, 10 B. & C. 679; *Hargreaves* v. *Hutchinson*, 2 Ad. & E. 12, 4 N. & M. 11. Where a contract is void, no lien can result from it.

Petersdorff, for the defendant.—There are no sufficient materials on the face of the special case to enable the court to hold the plaintiff entitled to maintain this action; it does not disclose any violation of the provisions of the act; it is consistent with all the facts stated that the defendant never received or sought to obtain a larger interest than at the rate of 5 per cent.: and by the 30th section of the act it is provided "that nothing in this act contained shall extend or be construed to extend to any person or persons whomsoever who shall lend money to any person or persons whomsoever upon pawn or pledge at

1. Defendant guilty of no violation of the act.

Section 30.

1838.

FERGUSSON v. NORMAN.

the rate of 5*l.* per cent. per annum interest, without taking any further or greater profit for the loan or forbearance of such money lent, on any pretence whatsoever." If the case is within the 30th section, it stands wholly unaffected by the prior clauses; and to exclude the defendant from the benefit of that proviso, the fact (*Tregoning* v. *Attenborough*, 7 Bing. 97, 4 M. & P. 227,) should have been affirmatively found by the arbitrator, that the defendant received or contracted to receive a larger rate of interest than 5 per cent.: otherwise the plaintiffs would not be entitled to recover without shewing a previous tender of the money advanced, with legal interest. [*Tindal*, C. J.—It is assumed throughout the award that the bankrupt was dealing with the defendant as a pawnbroker.—*Bosanquet*, J.—And, if it were even doubtful, the proviso being found in a distinct clause, it would be for the defendant to shew himself within it.]

2. Notwithstanding any violation of the act, defendant entitled to a lien on the goods.

2. Assuming that the award sufficiently discloses on the face of it a violation on the part of the defendant of the pawnbrokers' act, still it will not prevent the attaching of the lien claimed on the part of the defendant. There is no analogy between this case and those that have been cited: a right of action and a right to a lien are not correlative or coextensive—*Nicholson* v. *Chapman*, 2 H. Blac. 254. There are many authorities to shew that a right of lien may exist in respect of a claim barred by the statute of limitations—*Barlow* v. *Tattershall*, 4 Russ. & M. 237; *Higgins* v. *Scott*, 2 B. & Ad. 413. It may be conceded that no lien can arise out of a contract that is usurious, and that *Fitzroy* v. *Gwillim* cannot be supported to that extent, inasmuch as the contract in that case is expressly declared void. *Law* v. *Hodson*, *Bensley* v. *Bignold*, *Wetherell* v. *Jones*, *Forster* v. *Taylor*, and *Cope* v. *Rowlands*, were all cases in which the respective plaintiffs were seeking to enforce contracts through the interposition of the law. In no case is the lender deprived of remedy against the borrower where the usurious contract is col-

lateral only. In *Mouys* v. *Leake*, 8 T. R. 411, it was held, that, although the grant of a rent-charge on a benefice might be void (by the 13 Eliz. c. 20), yet a personal covenant in the deed of grant, to pay the rent-charge, and a warrant of attorney given as a collateral security, were not therefore invalid. So, in *Kerrison* v. *Cole*, 8 East, 231, it was held, that, though a bill of sale for transferring the property in a ship by way of mortgage may be void, as such, for want of reciting the certificate of registry therein, as required by the statute 26 Geo. 3, c. 16, s. 16, yet the mortgagor may be sued upon his personal covenant contained in the same instrument for the re-payment of money lent. And in *Readshaw* v. *Balders*, 4 Taunt. 57, a covenant in an annuity deed made prior to the statute 46 Geo. 3, c. 65, s. 115 (which statute has a retrospective operation), whereby the grantor of the annuity covenanted to pay the same on the days and times &c., without any deduction whatever out of the same or any part thereof for or in respect of the then present or any then future property tax, was held void in respect of its obligation on the grantor not to deduct the property-tax, but not in respect of the payment of the annuity, subject to such deduction. In no case has a mere prohibition, under a penalty, been held to render the contract itself void, except where there has been a distinct legislative declaration to that effect, or the inference that the legislature did so intend is inevitable. There is nothing in the statute now under consideration to shew an intention on the part of the legislature that the violation of any of its provisions should involve the forfeiture of the pawnbroker's lien: but, on the contrary, there are clauses in the act that distinctly shew that it was only in certain specified instances that the forfeiture was to arise. Thus, in s. 11, it is provided that persons buying or taking in pledge unfinished goods, or linen or apparel intrusted to others to wash or mend, shall forfeit double the sum lent,

1838.

FERGUSSON v. NORMAN.

and restore the goods; and by s. 13, that, where goods are unlawfully pawned, the pawnbroker shall restore them. [*Tindal*, C. J.—In these cases the articles are to be restored to third parties; and they are cases in which by the common law no property would pass: none of these provisions apply as between the pawnbroker and the party pledging.]

Penalties limited.

The legislature has expressly declared (s. 26) that 10*l.* shall be the limit of the penalty to which a pawnbroker shall be subjected for a non-compliance with the regulations prescribed by the act: if the court hold him answerable in trover for the value of the goods also, he will be mulcted to an extent that never could have been contemplated. [*Tindal*, C. J.—That argument would equally have applied in all the cases, from *Bartlett* v. *Vinor* to *Cope* v. *Rowlands*. *Bosanquet*, J.—The difficulty you have to contend with is, to shew that any property can pass by a contract which is in itself a breach of the law.] The particular acts required by the statute to be done are all collateral to, and form no part of the contract.

Reply.

Barstow, in reply.—There is no pretence for the suggestion that the dealings by the bankrupt with the defendant were not in his character of pawnbroker. Nothing can be more clear than that no lien can attach in respect of a thing forbidden either by the common law or by statute. In *Readshaw* v. *Balders*, the covenant which was held void was contained in an instrument executed before the passing of the statute on which the objection was founded; and the words of the act were satisfied by holding them to apply only to the covenant.

Contracts made in contravention of the act, void.

TINDAL, C. J.—It appears to me that all the contracts entered into between the pledger and the pawnbroker, in which the latter has omitted to comply with the provisions of the 39 & 40 Geo. 3, c. 99, s. 6, are to be held void.

1838.

FERGUSSON v. NORMAN.

The several acts required by that section to be done by the pawnbroker, are not collateral to the contract, but are to precede or to accompany and form part of it. A distinction may well be drawn between such acts and those that are collateral and distinct from and wholly independent of the contract itself: for instance, the 23rd section requires, under a penalty of 10*l.*, that the pawnbroker's names and business shall be painted over his door; suppose this were altogether omitted, or incorrectly done, the party would be liable for the penalty, but it could scarcely be contended that all contracts entered into by him as a pawnbroker would therefore be avoided. The case here presented is altogether of a different character. By the 6th section, the pawnbroker is required, before he makes any advance on the pledge, amongst other things, to make certain inquiries of the party pledging, as to his name and place of abode, and whether lodger or housekeeper, and to enter the result of these inquiries in certain books to be kept for that purpose, and also on the ticket or duplicate given to the party pledging. These are acts that are required to be done by the pawnbroker before and at the time of entering into the contract. The object of requiring all these things evidently was, not merely the protection of those whose necessities or whose vices lead them to resort to such means of raising money, but, in a far greater degree, the protection of the public against frauds and robberies, the detection and punishment of which these regulations, if duly observed, would tend much to facilitate. Notwithstanding a specific penalty is imposed by the act, I am of opinion that a failure to comply with the several provisions of the 6th section renders the contract absolutely void. *Cope* v. *Rowlands* is a distinct authority to that extent: that case was decided upon a review of all the authorities, beginning with *Bartlett* v. *Vinor*, which alone would be a sufficient authority to govern this case.

Distinction as to collateral contracts.

The next question is, whether, notwithstanding the

Defendant acquires no lien.

1838.

FERGUSSON v. NORMAN.

contract is avoided, the defendant may not acquire a lien upon the property pledged, for the sums he has advanced upon it. Now, what is nature of a lien? It can only be acquired in one of three ways—by express contract—by the general course of dealing in the trade in which it is set up—or by the peculiar course of dealing between the parties in the particular transaction. The two first are clearly out of the question here: and, as to the third, I cannot see how a valid lien is to arise out of a contract that is altogether void.

Cases of partial avoidance of the contract.

It is said that there are cases where parties have been allowed to recover the money advanced, though the contract in respect of which it was advanced is avoided: and for this *Mouys* v. *Leake* and *Kerrison* v. *Cole* have been cited. In *Mouys* v. *Leake*, though the security was made void by the 13 Eliz. c. 20, as a charge upon the defendant's benefice, there was nothing in the statute to overreach the rest of the transaction. So, in *Kerrison* v. *Cole*, though the indenture was void as a transfer of the ship, the requisites of the statute 26 Geo. 3, c. 60, s. 17, not having been complied with, yet there was nothing in the transaction or in the act to impeach the bonâ fide advance of the money, or to prevent the mortgagor from being sued upon his personal covenant for its repayment. So, here, if there had been any collateral contract out of which a lien could have grown, independent and distinct from the illegal contract of pledge, the lien might have been upheld. But no contract appears save that which the statute by necessary inference declares void. The plaintiffs, therefore, will be entitled to a verdict for so much as falls within the specific objections above pointed out.

Defendant not entitled to any lien.

VAUGHAN, J.—I am of the same opinion. Upon the construction of the act, and by analogy to the decided cases, the defendant clearly cannot be entitled to any lien. In support of his claim, the defendant, in the first

1838.

FERGUSSON v. NORMAN.

place, relies on the absence of any express finding of the arbitrator that the defendant dealt as a pawnbroker in his transactions with the bankrupt—founding himself upon the 30th section, which provides "that nothing in the act contained shall extend or be construed to extend to any person or persons whomsoever who shall lend money to any person or persons whomsoever upon pawn or pledge at the rate of 5*l.* per cent. per annum interest, without taking any further or greater profit for the loan or forbearance of such money lent, on any pretence whatsoever." It is true the award contains nothing to shew specifically that more than 5*l.* per cent. was taken upon any one occasion: but, looking at the whole history of the transactions—seeing that in most of the cases mentioned the statute had been duly complied with, and that there is no suggestion that any pledge was in any one instance redeemed or treated as redeemable at 5*l.* per cent. —one is irresistibly led to the conclusion that the defendant was dealing throughout as a pawnbroker.

Consequences of non-compliance with s. 6.

With regard to the 6th section, I am clearly of opinion that the due observance of all the prescribed ceremonies was a condition precedent to the acquisition by the defendant of any rights under it. The question, is, has he made a legal contract? And, if not, what is the effect of a violation of the statute? Can any lien arise out of a contract made in the face of an express prohibition? I am unable to distinguish *Forster* v. *Taylor* and *Cope* v. *Rowlands* from the present case. In *Forster* v. *Taylor*, it was contended that there had been no more than a breach of a parliamentary regulation protected by a penalty, and that the contract of sale was not thereby avoided. But the court held otherwise. Upon the authority of these and the other cases cited on the part of the plaintiffs, as well as upon the words of the statute, I am clearly of opinion that no right of property or right of lien could be acquired by the pawnbroker under a contract in which

1838.

FERGUSSON v. NORMAN.

the provisions of the 6th section have been disregarded: and consequently that the defence here to that extent fails.

BOSANQUET, J.—I am of the same opinion. It sufficiently appears upon the face of the award that the defendant was dealing with the bankrupt as a pawnbroker: the arbitrator has expressly stated that the bankrupt, "on different occasions, amounting altogether to one hundred and forty-two, pledged with the defendant *as a pawnbroker* various articles of property." The only question is, whether or not these transactions were valid, or whether the defendant has been guilty of a violation of the statute. Now, the 6th section expressly directs that certain things shall be done by the pawnbroker before taking in a pledge: these, it is found, the present defendant on some occasions has omitted to do. The contract therefore is one that is prohibited by law; and, being so, is void—whether a penalty is annexed to the omission or not. If the contract is void, it is clear that no property passes to the pawnbroker under it. Undoubtedly there may be cases where the act that is prohibited may be collateral to the contract itself: but it is enough on the present occasion to say that such is not the case here.

COLTMAN, J.—It is clear that the defendant received the goods in question in his character of pawnbroker. A pawnbroker is one who lends money upon security, at a rate of interest that but for the statute would be usurious. To render legal the contracts made by such a person, it must be made to appear that he has duly complied with the regulations imposed upon the trade by the 6th section of the statute—which regulations constitute a condition precedent to his right to the protection of the statute. A failure to observe these things not only subjects the party to certain penalties, but, according to a long series of au-

1838.

FERGUSSON v. NORMAN.

thorities, altogether avoids the contract. The courts certainly are not prone to favour conditions precedent. But, upon the true construction of this act, and regard being had to the objects the legislature have had in view from the earliest period (17), it is perfectly clear that a non-compliance with the provisions above referred to altogether vitiates the contract.

Judgment for the plaintiffs (18).

(17) See the 1 Jac. 1, c. 21, ss. 4, 5.

(18) And see Jaques v. Withy, 1 H. Blac. 65; Langton v. Hughes, 1 M. & S. 593; Gas Light and Coke Co. v. Turner, post, Vol. 7, Easter Term, 1839.

WRIGHT and Others, Assignees of Ross, a Bankrupt, *v.* FEARNLEY.

Friday, Nov. 16th.

THIS was an action of trover brought by the plaintiffs, assignees of A. G. Ross, a bankrupt, to recover goods in the first count alleged to have been the property of the bankrupt before his bankruptcy, and wrongfully converted by the defendant, and in the second count averred to be the property of the plaintiffs, as assignees, with a like conversion.

The defendant pleaded (amongst other pleas) to the second count, that, after the said A. G. Ross became bankrupt, and before the date and issuing of the fiat against him, to wit, on the 26th of March, 1837, he, the said A. G. Ross, delivered to and deposited with the defendant the goods and chattels in the second count mentioned, in consideration of and upon certain large advances of money, amounting to a large sum of money, to wit, 2,000*l.*, then made and advanced by the defendant to the said A. G. Ross, at his request, upon the delivery and

One R., a trader, after a secret act of bankruptcy, and within two months before the issuing of a fiat against him, deposited goods with the defendant, in consideration of a present advance of money:—Held, that the assignees of R. might maintain trover for the goods, the transaction, though bonâ fide, and without notice of an act of bankruptcy, not being protected by the 6 Geo. 4, c. 16, s. 82.

Semble, that it would have been protected by s. 81, had the deposit been made more than two months before the issuing of the fiat. *Coltman*, J., dis.

1838.

WRIGHT v. FEARNLEY.

deposit of the said goods and chattels in the second count mentioned with the defendant to secure payment to the defendant of such advances thereon. And the defendant said that the said goods and chattels in the second count mentioned were delivered to and deposited with him as aforesaid, and the advances were made by him, the defendant, thereon as aforesaid, bonâ fide, and without any notice to him, the defendant, so dealing with the said A. G. Ross, of any prior act of bankruptcy or any act of bankruptcy committed by him the said A. G. Ross at the time of the defendant so dealing with him as aforesaid: and, because the said advances so made by the defendant as aforesaid had always since been and still were unpaid and owing to him, the defendant, he, the defendant, at the said time when &c., detained the said goods and chattels to secure the repayment of such sums of money by him the defendant advanced as aforesaid on the deposit with him of the said goods and chattels to secure the repayment thereof, as he, the defendant, lawfully might for the cause aforesaid: which was the said supposed conversion &c.—verification.

Replication.

To this plea the plaintiffs replied—that the advances in that plea mentioned were made by the defendant to the said A. G. Ross, and the goods and chattels in the second count in that plea mentioned were delivered to and deposited with the defendant by the said A. G. Ross, after the said A. G. Ross became bankrupt, and within two calendar months before the issuing of the fiat against the said A. G. Ross under which the plaintiffs were assignees —verification.

Rejoinder.

Rejoinder—that the said A. G. Ross did not, nor did the plaintiffs, at any time tender or offer to pay, or pay, to the defendant the said advances of money in the said plea mentioned, or any part thereof; and the same remained and were wholly unsatisfied and unpaid to the defendant—verification.

1838.

WRIGHT v. FEARNLEY.

To this rejoinder, the plaintiffs demurred generally: and the defendant joined in demurrer.

The points marked for argument, were—

For the plaintiffs—that, as it appeared and was admitted by the pleadings that the goods in question, the property of the assignees, were received by the defendant upon a pledge by the bankrupt after his bankruptcy and within two months before the fiat, as a security for advances then made by the defendant to the bankrupt, such transaction was not protected by the 81st (19) or 82nd (20) section of the 6 Geo. 4, c. 16, or any other exception in the bankrupt law; and, consequently, that the assignees were entitled to recover the value of such goods detained under

Plaintiff's point.

(19) "All conveyances by, and all contracts and other dealings and transactions by and with any bankrupt bonâ fide made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, bonâ fide executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed: provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not, at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed."

(20) "All payments really and bonâ fide made, or which shall hereafter be made *by* any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and bonâ fide made, or which shall hereafter be made *to* any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed: and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed."

1838.

WRIGHT v. FEARNLEY.

the pledge, without having tendered or offered to pay the defendant the amount of his advances.

Defendant's point.

For the defendant—that the advances made by the defendant, or the consideration of the deposit of the goods with him to secure the repayment of such monies then advanced and paid thereon, bonâ fide, and without notice of any act of bankruptcy, before the date and issuing of the fiat, was a payment within the 82nd section of the 6 Geo. 4, c. 16, and thereby protected; and that the defendant acquired a legal lien on the goods so deposited, until the defendant's advances were repaid or tendered to him.

Argument for the plaintiff.

Tomlinson, in support of the demurrer. — It stands admitted on the face of the record that the goods in question were deposited by the bankrupt with the defendant after an act of bankruptcy and within two months before the issuing of the fiat. All acts done by a trader in the disposition of his goods after an act of bankruptcy committed are void unless specially protected. The sole question here is, whether this transaction falls within any of the protecting clauses of the 6 Geo. 4, c. 16. It clearly does not fall within the 81st section, for that protects only conveyances, contracts, and other dealings and transactions entered into more than two months before the issuing of the fiat: neither is it within the 82nd, a loan of money upon a deposit of goods not being a *payment* within the meaning of the clause. That a *loan* is not within the protection of s. 82, was distinctly held in *Cannan* v. *Denew*, 3 M. & Scott, 761, 10 Bing. 292. There, J. S., after having committed a secret act of bankruptcy, borrowed of the defendant 2,700*l.*, assigning to him by way of security certain furniture and effects; with a power of sale in case of non-payment by a specified day, and a clause of redemption on payment of principal and interest. The

furniture remained in the possession of J. S., and within two calendar months after the assignment a fiat issued against him. It was held that the assignees might recover the value of the goods in trover; and that the transaction was not protected as a *payment* within the 82nd section of the 6 Geo. 4. c. 16. Tindal, C. J., there says: "Here, there has been no *payment* to the bankrupt, but a *loan*, for which the bankrupt has given a security. The case therefore falls within the express words of the 81st section; it is a conveyance by or a contract with the bankrupt before his bankruptcy; and the only question is, whether it was made and entered into more than two calendar months before the date and issuing of the fiat against him. It is a conveyance of his property of which the bankrupt retained the possession, and was to retain it until the month of March following. Without entering into any discussion which might arise upon this state of facts, it is sufficient to say that this was a transaction intended to be protected, if protected at all, by the 81st section, and that it does not fall within the protection, because it took place *within* two calendar months before the issuing of the fiat." Gaselee, J., says: "I understand a payment to be a delivery over of money in discharge of an antecedent debt. There was no antecedent debt here; it was a mere loan. I therefore think that the transaction does not fall within the protection of the 82nd section." And Alderson, J., says: "The statute 19 Geo. 2, c. 32, appears to me to explain the meaning of the words 'payments made by or to any bankrupt' in the 82nd section of the existing bankrupt law. That act recites that 'whereas many persons within the description of and liable to the statutes concerning bankrupts, frequently commit secret acts of bankruptcy unknown to their creditors and other persons with whom in the course of trade they have dealings and transactions, and after the committing thereof continue to appear publicly and carry on their trade and

1838.

WRIGHT v. FEARNLEY.

19 Geo. 2, c. 32.

1838.

WRIGHT v. FEARNLEY.

dealings, by buying and selling of goods and merchandizes, drawing, accepting, and negotiating bills of exchange, and paying and receiving money on account thereof, in the usual way of trade, and in the same open and public manner as if they were solvent persons and had not become bankrupts: and whereas the committing such secret acts of bankruptcy to avoid and defeat payments really and bonâ fide made in the cases and under the circumstances above mentioned, where the persons receiving the same had not notice of or were privy to such persons having committed any act of bankruptcy, will be a great discouragement to trade and commerce, and a prejudice to credit in general.' It then proceeds to enact, 'that no person who is or shall be really and bonâ fide a creditor of any bankrupt for or in respect of goods really and bonâ fide sold to such bankrupt, or for or in respect of any bill or bills of exchange really and bonâ fide drawn, negotiated, or accepted by such bankrupt in the usual and ordinary course of trade and dealing, shall be liable to refund or repay to the assignee or assignees of such bankrupt's estate any money which before the suing forth of such commission was really and bonâ fide and in the usual and ordinary course of trade and dealing received by such person of any such bankrupt before such time as the person receiving the same shall know, understand, or have notice that he is become a bankrupt, or that he is in insolvent circumstances.' The legislature, in protecting the payment, obviously contemplated the sale itself as having been protected under the prior statute of 1 Jac. 1, (c. 15, s. 14). If that be so, it explains what is meant in the 82nd section of the 6 Geo. 4, c. 16, by validating payments really and bonâ fide made to the bankrupt in the usual and ordinary course of business." No doubt, upon the authority of *Cash* v. *Young*, 3 D. & R. 652, 2 B. & C. 413, and *Hill* v. *Farnell*, 9 B. & C. 45, if this had been a bonâ fide payment upon a sale of goods, it would have

been protected, though made after a secret act of bankruptcy and within two months before the issuing of the fiat.

Argument for the defendant.

Hoggins, contrà.—The object of the statute evidently was to protect all bonâ fide money transactions had with the bankrupt without notice of an act of bankruptcy. The 47th section—which enacts that "every person with whom any bankrupt shall have really and bonâ fide contracted any debt or demand before the issuing the commission against him, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be admitted to prove the same and be a creditor under such commission, as if no such act of bankruptcy had been committed, provided such person had not at the time the same was contracted notice of any act of bankruptcy by such bankrupt committed"—would enable a party to prove a debt contracted under circumstances like those disclosed upon this record. [*Tindal*, C. J.—That is precisely what the assignees are seeking to compel the defendant to do.] The defendant need not prove, for the transaction is clearly a *payment*, and within the protection of the 82nd section. Giving cash for a Bank post bill is a payment within that section—*Willis* v. *The Bank of England*, 4 Ad. & E. 21, 5 N. & M. 478: there can be no reason why giving money for any other description of chattel should not be equally protected. [*Tindal*, C. J.—The transaction between the bankrupt and the defendant did not change the property in the goods; the defendant, if he parted with them, would be a wrong-doer.] It is by no means an unusual thing for the Bank of England and private banking firms to advance money to merchants and others on deposits of bills of exchange, bills of lading, dock or other warrants, policies of insurance, and the like: if the present transaction be unprotected, so also must those be. Is not a *loan* of money a *payment*? [*Tindal*, C. J.

Transaction amounts to a *payment* within s. 82.

1838.

WRIGHT v. FEARNLEY.

Clearly not, unless words are to lose their ordinary signification.] It is the duty of the court to construe the statute liberally and remedially for the public at large—Per Abbott, C. J., in *Cash* v. *Young*. *Cannan* v. *Denew* was not, like this, the case of a bonâ fide advance of money on the delivery of goods. In *Woodbridge* v. *Swann*, 4 B. & Ad. 633, 1 N. & M. 724, after the bankruptcy of one of two partners, the solvent partner, thinking the firm capable of paying its debts, continued the business, and paid partnership money into a banker's, to be applied in discharge of running bills of the firm payable at the bank; and it was so applied: it was held that this payment, having been made bonâ fide, and without any contemplation of bankruptcy by the solvent partner, was valid at law. The assignees and the solvent partner afterwards opened a fresh account at the bank, and paid in 900*l.* to discharge a debt on the old account which carried interest: the second partner then became bankrupt; and it was held that the assignees of the two could not recover this last-mentioned sum. *Shaw* v. *Batley*, 4 B. & Ad. 801, 1 N. & M. 751, is also a strong authority to shew that the present case is one that falls within the 82nd section of the 6 Geo. 4, c. 16. The facts were these:—A bankrupt made a purchase of timber by two agreements, one before and one after the act of bankruptcy, and, after the act of bankruptcy, received part of the timber without paying for it, but was not entitled to receive the remainder without giving security for the whole. After the act of bankruptcy the defendant became security, and purchased from the bankrupt the benefit of the contract; which purchase was recited in the instrument by which the defendant became security. The bankrupt afterwards agreed with the defendant that he the bankrupt would pay the money due to the vendor for the timber purchased by the first agreement and in part received, and should be entitled to retain the timber so purchased. The bankrupt

1838.

WRIGHT v. FEARNLEY.

then delivered money and bills to the defendant, to be paid to the vendor for the timber first purchased. The defendant paid the cash to his own bankers, and indorsed the bills to them; and afterwards paid the amount of the cash and of the bills to the vendor, by a single draft on those bankers. After this the commission issued. It was held that the defendant was not liable to repay the cash to the assignees, nor to indemnify the bankrupt's estate against the bills; for, the defendant was the mere agent of the vendor, and neither the cash nor the proceeds of the bills could have been recovered back from him, the transaction on his part being a bonâ fide one, protected by the 6 Geo. 4, c. 16, s. 82. No case can be cited to shew that a lien is not within the protection of s. 82. On the contrary, in *Dixon* v. *Purse*, Peake's Add. Cas. 187, it was ruled by Lord Kenyon, that, if A. have a lien on goods of a bankrupt in his hands, and B. without knowledge of any act of bankruptcy pay A. the sum for which he has a lien, and advance a further sum to the bankrupt upon those goods which are delivered to him, trover will not lie by the assignees.

Mutual credit.

At all events, this is a case of mutual credit, within the 50th section. In *Ex parte Prescot*, 1 Atk. 230, where the petitioner, a creditor of the bankrupt for 110*l.*, and a debtor to him upon bond for 340*l.* payable on a future day, with interest, applied that he might set off his demand of 110*l.* against the principal and interest due on the bond as far as it would go, and not be obliged to prove his debt under the commission, and take a dividend upon it only; it was held, that, though this was not in strictness a case of mutual debts, yet it was a case of mutual credit, for, the bankrupt gave credit to the petitioner in consideration of the bond, though payable at a future day, and he gave credit for the debt the bankrupt owed him upon simple contract, and therefore within the equity of the 5 Geo. 2, c. 19. So, in *Ex parte Deeze*, 1 Atk. 228, it was held

1838.

WRIGHT v. FEARNLEY.

that mutual credit is not confined to pecuniary demands only; but, if a man has goods in his hands belonging to a debtor, it constitutes a mutual credit. In *Olive* v. *Smith*, 5 Taunt. 60, Gibbs, J., says: "If the doctrine of *Ex parte Deeze* is to be supported, the doctrine of lien is quite put out of doors in all cases of bankruptcy whatever. For, the doctrine of mutual credit will cover all the cases of lien, and also goes a great deal further. In the case of *French* v. *Fenn*, Cooke's Bankrupt Law, 5th edit. 554, the court speaks with great approbation of *Ex parte Deeze;* and Buller, J., and afterwards Lord Mansfield, C. J., adopted it as a principle, that, wherever there is a mutual trust, that is, wherever one party being indebted to another intrusts that other with goods, it is a case of mutual credit. And this is not an obiter dictum, but made a material ingredient in the judgment in an important case, *French* v. *Fenn*." So, here, the transaction between the defendant and the bankrupt must in the result be matter of account between them. [*Tindal*, C. J.—All that we have to do is, to pronounce upon the validity of the plea. There can be no set-off upon this record.]

Tomlinson, in reply, was stopped by the court.

Case not within s. 82.

TINDAL, C. J.—It appears to me that the transaction stated on these pleadings does not amount to a payment within the meaning of the 82nd section of the 6 Geo. 4, c. 16, and consequently is not within the protection of that clause. The section professes to protect all *payments* really and bonâ fide made *by* or *to* any bankrupt after a secret act of bankruptcy and before the issuing of a fiat. The very word *payment* would of itself seem to denote a delivery of money in satisfaction of an antecedent debt, or at least of a debt created at the time of the transaction. Here, there was no debt, either antecedently or presently contracted: it was a mere loan of money on the deposit of

goods. But, without relying upon the natural meaning and understanding of the word *payment*, it is to my mind perfectly clear that the legislature contemplated only payments as between debtor and creditor; for, when they in the first part of the clause speak of "*payments* really and bonâ fide made *by* any bankrupt, or by any person on his behalf, *to any creditor* of such bankrupt, such payment not being a fraudulent preference of such *creditor*," what rational conclusion can be drawn other than that the word *payment* is there used with reference to the ordinary transactions and dealings between debtor and creditor? and, again, when they go on in the second part of the clause to provide that "all *payments* really and bonâ fide made *to* any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid &c., and such *creditor* shall not be liable to refund," &c., in what other sense can the word *payment* be used, accompanied as it is by the word *creditor*, than as denoting the liquidation of a pre-existing debt, or one arising out of the dealing of the parties at the moment? The 47th section seems to me rather to fortify than to weaken this construction: it gives parties a right (which they did not before possess) to prove in respect of debts contracted after a secret act of bankruptcy.

1838.

WRIGHT v. FEARNLEY.

Although the present case does not appear to me to fall within the 82nd section, I think it does fall within the 81st; of which, however, the defendant is precluded from availing himself by reason of the transaction having taken place within two months before the date and issuing of the fiat. That section renders valid all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt bonâ fide made and entered into more than two calendar months before the date and issuing of the commission against him; provided the person or persons so dealing with the bankrupt had not, at the time of such conveyance, contract, dealing, or transaction, notice

Within s. 81.

1839.

WRIGHT v. FEARNLEY.

of any prior act of bankruptcy by him committed. A loan of money on a deposit of goods is a dealing or transaction within that section. The 81st section being expressly applicable to this case, I think we cannot hold it to be within the 82nd. See the absurdity that would attend such a construction: had this been a formal mortgage, the case would confessedlyhave ranged itself under the 81st section, but, the conveyance not having been made more than two months before the issuing of the fiat, it would not be protected: and, is the defendant to be placed in a better situation, and held within the protection of the 82nd section, because he has contented himself with a lesser security?

Not within s. 82.

VAUGHAN, J.—I am of the same opinion. This was not a case of payment; but a mere loan: it clearly is neither within the words nor the spirit of the 82nd section. *Shaw* v. *Batley* was a totally different case: there was a bonâ fide purchase of timber there, and in the proper season. So, in *Willis* v. *The Bank of England*, there was a regular exchange of property, which amounted to neither more nor less than a purchase and sale.

Not within s. 82.

BOSANQUET, J.—I am also of the same opinion. The defendant's right to retain from the assignees the property in question depends upon whether or not the transaction is protected by the 82nd section of the 6 Geo. 4, c. 16. It appears to me that an advance of money by way of loan upon the security of a deposit of goods cannot be within the protection of that clause. The point has been already decided in *Cannan* v. *Denew*. The clause as to mutual credits does not appear to me to have any bearing on this case, the sole question here being whether or not the assignees are entitled to recover the goods in specie.

1838.

WRIGHT v. FEARNLEY.

Not within either section.

COLTMAN, J.—The case appears to me to be entirely free from doubt. If *Cannan* v. *Denew* had not already decided it, I should have had no difficulty in holding the transaction to be within neither the 81st nor the 82nd section. The 82nd section evidently contemplates only the *payment of a debt.* The 81st is entirely out of the case, except inasmuch as it furnishes an inference that a more limited construction is to be applied to the 82nd. It is only where the transaction between the bankrupt and the creditor must finally result in mutual debts that the 50th section comes into operation (21).

Judgment for the plaintiffs (22).

A writ of error was brought upon this judgment, and came on to be argued in the Exchequer Chamber on the 29th June, 1839, before Parke, B., Patteson, J., Gurney, B., Williams, J., Coleridge, J., and Maule, B.

The court took time to consider. Their present inclination seemed to be that the transaction in question *was* a "payment" within the 82nd section (23).

(21) See Gibson v. Bell, 1 Scott, 711, 1 New Cases, 743; Morley v. Inglis, 4 New Cases, 58, 5 Scott, 314, and the cases there cited.

(22) The delivery of goods upon a threat of arrest, is not a *payment* within the 6 Geo. 4, c. 16, s. 82. Smith v. Moon, M. & M. 458—per Tindal, C. J.

(23) To remedy the inconvenience of a decision in affirmance of the judgment of the court of Common Pleas, a bill has been introduced into parliament, by which it is proposed to enact—"That all contracts, dealings, and transactions by and with any bankrupt really and bonâ fide made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt bonâ fide executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed: Provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of

1838.

Thursday, Nov. 16th.

The court allowed judgment to be entered up on a warrant of attorney above one and under ten years old, upon an affidavit that the defendant had been seen and conversed with by the deponent *twenty-seven* days before the motion was made.

POWELL *v.* HOWARD.

BALL moved for leave to enter up judgment on a warrant of attorney above one and under ten years old—See Reg. Gen. Hilary Term, 2 Will. 4, r. 73. The affidavit upon which he moved stated that the deponent had seen and conversed with the defendant on Saturday, the 20th October last. He referred to *Cockman* v. *Hellyer*, 1 New Cases, 1, 3 M. & Scott, 487, 2 Dowl. 816, to shew, that, since the rule of Hilary, 2 Will. 4, s. 1, reg. 3, whic provides "that all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, *whether in term or vacation*, when signed, and shall not have relation to any other day," it is not necessary that the affidavit upon which a motion like the present is founded should state that the defendant was alive on a day *within the term*. [*Tindal*, C. J.—The party should be shewn to be alive within a reasonable time. In the case cited, the motion appears to have been made on the first day of the term, and the defendant was sworn to be living on the day previous.] In *Watts* v. *Bury*, 4 Dowl. 44, Coleridge, J., held *twenty-five* days, and in *Stocks* v. *Willes*, 5 Dowl. 221, Littledale, J., held *thirty-six* days, to be a reasonable time. Here, the party was seen alive *twenty-seven* days since.

PER CURIAM.—Upon the authority of those cases, it seems that this affidavit is sufficient.

Rule granted (24).

any prior act of bankruptcy by him committed: Provided also, that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of such fraudulent preference."

(24) In Tidd's New Practice, 283, the result of the modern authorities is thus stated:—"It is suffi-

1838.

Wednesday, Nov. 21st.

PILMORE *v.* HOOD.

The declaration stated that one B. had agreed with the plaintiff for the purchase of the lease and good-will of a public-house; that, before and at the time of making the agreement, the defendant falsely, fraudulently, and deceitfully represented to B. that the trade of the house was of a certain extent; that B. not being able to complete the purchase, it was afterwards agreed between the plaintiff, B., and the defendant, that the plaintiff should become the purchaser in the room of B., and at and before the making of the last-mentioned agreement, B. communicated to the plaintiff the representation the defendant had made to him; *of all which the defendant then had notice;* that the plaintiff, confiding in the representation so made by the defendant, agreed to become the purchaser, and paid the purchase-money; that the representation was false, as the defendant well knew; and that the plaintiff sustained damage. The defendant pleaded that he did not authorize B. to communicate to the plaintiff the representation he the defendant had made to B.:—Held, that the declaration disclosed a good cause of action; and that the plea was no answer to it.

CASE for a deceit. The declaration stated, that, before the committing of the grievances by the defendant as thereinafter mentioned, by a certain indenture of lease, bearing date the 25th September, 1819, and made between the Rev. James Archer, the Rev. Joseph Hodgson, the Rev. James Yorke Bramston, and the Rev. William Victor Fryer, of the one part, and Robert Simmonds of the other part, for the considerations therein mentioned, they, the said James Archer, Joseph Hodgson, James Yorke Bramston, and William Victor Fryer, did demise, lease, and to farm let unto the said Robert Simmonds, his executors, administrators, and assigns, all that

cient to shew by affidavit that the defendant was alive within a *reasonable* time before the day on which the motion is made—Jordan v. Farr, 4 N. & M. 347, 2 Ad. & E. 437. In that case, the court of King's Bench granted a rule, moved for on the *third* day of the term, upon an affidavit stating that the defendant was alive on a day *six* days previously to the commencement of the term: and a rule was granted in a subsequent case, (Watts v. Bury, 4 Dowl. 44), where the defendant had been last seen alive above *three weeks*, and in another, (Stocks v. Willes, 5 Dowl. 221), *five weeks* before the application. In order to obtain judgment on an old warrant of attorney, the defendant must not only be stated to have been *seen* within a reasonable period, but to have been seen *alive*—Chell v. Oldfield, 4 Dowl. 629. Where a letter, however, had been recently received, in the handwriting of the defendant, it was deemed sufficient evidence that he was alive, in order to sign judgment on an old warrant of attorney—Gray v. Withers, 4 Dowl. 636—per Patteson, J."

And see Krell v. Joy, 4 Dowl. 600.

1838.

PILMORE v. HOOD.

messuage or tenement situate and being on the North side of Long Lane and the South-West side of Charterhouse Street, and then used or occupied as a public-house or liquor shop, and called or known by the name or sign of "The Red Cow," together with all appurtenances thereto belonging—to hold the same unto the said Robert Simmonds, his executors, administrators, and assigns from the 25th of March then last past, for the term of twenty-nine years, at the yearly rent of 50*l.*, payable quarterly as therein mentioned, and subject to the covenants and agreements therein contained; that, by divers mesne assignments, the said indenture of lease, and the premises thereby demised, afterwards, and before the committing of the grievances thereinafter mentioned, to wit, on the 1st February, 1836, had become legally and absolutely vested in the defendant, for all the rest, residue, and remainder of the said term; and the defendant then carried on the trade or business of a publican and licensed victualler at the said messuage and premises; that, afterwards, and before the committing of the grievances thereinafter mentioned, to wit, on the day and year last aforesaid, one Robert Bowmer had contracted and agreed with the defendant for the absolute purchase of the said lease (with the good-will of trade and possession) of the dwelling-house and premises thereby demised, at or for a certain price or sum of money, to wit, the sum of 1,175*l.*, but no assignment thereof had been made to him the said Robert Bowmer; and the defendant, at and before the making of the said agreement with the said Robert Bowmer, falsely, fraudulently, and deceitfully pretended and represented to the said Robert Bowmer that the trade of the said public-house had been and then was 180*l.* per month, all retail over the counter; that the said Robert Bowmer not being able to complete the said purchase, it was afterwards, to wit, on the day and year last aforesaid, agreed by and between the plaintiff, Robert Bowmer, and the defendant,

1838.

PILMORE v. HOOD.

that he the plaintiff should become the purchaser of the premises in the room and stead of the said Robert Bowmer; and, at and before the making of the last-mentioned agreement, the said Robert Bowmer communicated to the plaintiff that the defendant had at and before the making of the first-mentioned agreement with him, Robert Bowmer, pretended and represented to the said Robert Bowmer, that the trade of the said public-house had been and then was 180*l.* per month, all retail over the counter: *of all which the defendant* at and before the making of the agreement secondly above mentioned *had notice:* that the plaintiff, confiding in the said representations so made by the defendant as aforesaid, then agreed to become the purchaser of the said premises at and for a certain price or sum of money, to wit, the sum of 1,175*l.*, in the room and stead of the said Robert Bowmer; and the plaintiff afterwards, to wit, on the day and year last aforesaid, paid the said sum, to wit, 1,175*l.*, to the defendant for the same: whereas, in truth and in fact, the trade of the said public-house had not been nor was 180*l.* per month, all retail over the counter, as the defendant, at the time of his making his said false and deceitful representation, and also at the time of his entering into the last-mentioned agreement, well knew: and the plaintiff further said, that the defendant, by means of the premises, on the day and year last aforesaid, falsely and fraudulently deceived the plaintiff on the said sale, and thereby the said premises had become and were of no use or value to the plaintiff, and the plaintiff had sustained great trouble and expense, to wit, an expense of 1,000*l.*, in and about the carrying on the business of a publican and licensed victualler in the said messuage and premises, and had sustained great loss in disposing of the said premises: to the plaintiff's damage of 3,000*l.*

Plea—that the repetition was unauthorised.

The defendant pleaded—that he did not authorize the said Robert Bowmer to communicate to the plaintiff that

1838.

PILMORE v. HOOD.

he, the defendant, had pretended and represented to the said Robert Bowmer that the trade of the said public-house in the declaration mentioned, had been and then was 180*l.* per month, all retail over the counter, in manner and form as in the declaration in that behalf above alleged—verification.

Special demurrer.

To the above plea, the plaintiff demurred specially, assigning for causes—that it was not averred in the declaration that the defendant did authorize Bowmer to communicate to the plaintiff that the defendant had pretended and represented to Bowmer that the trade of the public-house in the declaration mentioned had been and then was 180*l.* per month, all retail over the counter; and that it was not necessarily understood, intended, or implied that such an averment was contained in the declaration—that it was not necessary to the maintenance of the action that the declaration should contain such an averment—that the plea amounted to an immaterial traverse, and was no answer to declaration, or any part thereof, inasmuch as the plaintiff would be entitled to recover in the action, although the defendant did not authorize Bowmer to communicate to the plaintiff that the defendant had pretended and represented to Bowmer that the trade of the public-house in the declaration mentioned had been and then was 180*l.* per month, all retail over the counter—and that the plea was in other respects uncertain, informal, and insufficient, &c.

Joinder.

The defendant joined in demurrer.

Argument for the plaintiff.—The plea bad in substance.

Stammers, in support of the demurrer.—The plea is bad in substance, and affords no answer to the declaration or any part of it. It is laid down broadly in Comyns's Digest, *Action upon the Case for a Deceipt*, (A. 1.), that "an action upon the case for a deceipt lies when a man does any deceipt to the damage of another:" upon which Lord Kenyon, in *Pasley* v. *Freeman*, 3 T. R. 64, observes:

1838.

PILMORE v. HOOD.

"Comyns indeed has not cited any authority for this opinion; but his opinion alone is of great authority; since he was considered by his contemporaries as the most able lawyer in Westminster-Hall." The circumstances disclosed upon the face of the declaration are these:—The defendant, who was the owner of a public-house, entered into a treaty for the sale of it to one Bowmer, representing to him that the trade of the house was 180*l.* per month, ready money. Bowmer being unable to complete his contract for the purchase of the lease and goodwill, procured the plaintiff to stand in his place, repeating to him the representation of the defendant as to the extent of the trade. The defendant, with knowledge of the representation so made by Bowmer to the plaintiff, allowed the latter to become the purchaser. And the representation has turned out to be false. Qui tacet consentire videtur, ubi tractatur de ejus commodo. In *Hunsden* v. *Cheyney*, 2 Vern. 150, where a woman who was the absolute owner of a term, being present at a treaty for her son's marriage, heard him declare that the term was to come to him at her death, and was a witness to the deed whereby the reversion of the term was settled on the issue of the marriage after her death: it was held that the mother was compellable in equity to make good this settlement, and to settle the reversion of the term accordingly, after her death: and the court, "as a like case, cited the case of Dr. Amyas, who stood by and suffered a purchaser to go on without disclosing of his title; and the case between *Charles Clare* and *The Earl of Bedford*, who only witnessed a deed, and told the money lent at his master's chamber, being his clerk, and for that alone had his own security postponed." (25) Several authorities to the same effect are

(25) In the case of Mocatta v. Murgatroyd, 1 P. Wms. 394, Lord Cowper is reported to have decreed that the first mortgagee shall in such case be postponed, though there be no actual proof of his knowing the contents of the deed he attested. But Mr.

1838.

PILMORE v. HOOD.

collected in Bacon's Abridgment, *Fraud* (B). *Hill* v. *Gray*, 1 Starkie, 434, is in point. That was an action of assumpsit to recover the sum of 1,000*l.* for a Claude which had been sold by the plaintiff to the defendant. It appeared that a person of the name of Butt had been employed by the plaintiff to sell the picture in question. The defendant, being desirous of purchasing it, pressed Butt to inform him whose property it was, which the latter refused to do. In the course of the treaty, Butt being at that time employed in selling a number of pictures for Sir Felix Agar, the defendant, misled by circumstances, erroneously supposed that the picture in question was also the property of Sir Felix Agar. Butt knew that the defendant laboured under this delusion, but did not remove it [in the present case the defendant himself *created* the delusion], and the defendant, under this misapprehension, purchased the picture. The plaintiff offered to prove, by the testimony of the most eminent artists, that the picture was a genuine Claude, and of great value: and it appeared, that, after the sale had been completed, and after the defendant had been informed that the picture was not the property of Sir Felix Agar, he had objected to the payment, not on the ground of any deception that had been practised with respect to the ownership, but on the ground that the picture was not a genuine Claude. Lord Ellenborough said: "Although it was the finest picture that Claude ever painted, it must not be sold under a deception. The agent ought to have cautiously adhered to his original stipulation, that he should not communicate the name of

Cox, the editor of that book, states that he has not been able to find this decree in the registrar's book. And Lord Thurlow said, in the case of Becket v. Cordley, that he thought this case of Mocatta v. Murgatroyd went too far, in imputing notice to the first mortgagee, from the *mere* circumstance of his being a witness to the second mortgage, since it is in common practice for persons to attest the execution of deeds without being made acquainted with their contents.

1838.

PILMORE v. HOOD.

the proprietor, and not to have let in a suspicion on the part of the purchaser which he knew enhanced the price. He saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it. I take for granted that the plaintiff will be able to prove, by the judgment of the first professional artists, that this is a genuine picture of Claude's, and it would not be possible to go further. In Italy the fact might admit of other proof; as, where a picture has been long preserved in a particular cabinet: here, it can only be proved by the concurrent judgment of artists as to its similitude. This case has arrived at its termination; since it appears that the purchaser laboured under a deception, in which the agent permitted him to remain on a point which he thought material to influence his judgment. I am of opinion that the contract is void."

As to the form of the plea.

The plea is also bad in point of form: it traverses a matter not alleged in the declaration. In 1 Wms. Saund. 312 *d*, n. (4), it is laid down, upon the authority of several cases, that "a traverse must be taken of some allegation contained in the adverse pleading, and a plea cannot conclude with a traverse of what has not been before alleged or necessarily implied, though it may affect the merits of the case." Here, the plea amounts to no more than a denial of the authority of Bowmer, which is nowhere alleged in the declaration. [*Tindal*, C. J.—It is not pleaded as a traverse, but as new matter; and it concludes with a verification: it is not therefore open to that objection.]

Argument for the defendant.—The declaration discloses no cause of action.

Warren, contrà.—The declaration is in substance bad; or, at all events, the plea affords a sufficient answer to it. It does not appear from the declaration that the agreement between the defendant and the plaintiff was based upon the same terms as that originally made between the defendant and Bowmer: for aught that appears, the terms

1838.

PILMORE v. HOOD.

of the second agreement might, in consequence of the discovery of the misrepresentation made by the defendant to Bowmer, have been materially lowered. However, it stands admitted upon the record that the defendant gave no authority to Bowmer to communicate his representation to the plaintiff; that the defendant neither assented to nor sanctioned Bowmer's statement. It may be that the traverse is informally taken; but, if so, it should have been made the subject of a special demurrer—1 Wms. Saund. 312 *d*, n. (4). If issue had been taken on this plea, the whole merits between the parties would have been presented to the consideration of the jury. A party cannot be made responsible for the voluntary act of another, which is not authorized either expressly or impliedly by him. In *Hill* v. *Gray*, the purchaser was misled by the conduct of the vendor's agent. But, in *Ward* v. *Weeks*, 7 Bing. 211, 4 M. & P. 796, which was an action on the case for slanderous words alleged to have been spoken by the defendant of the plaintiff, the declaration alleged for special damage, that, by reason of the committing of such grievance, one Bryer refused to give the plaintiff credit; the evidence was, that the defendant had spoken the words to one Bryce, and that Bryce had communicated the statement, as the statement of the defendant, to Bryer, who thereupon refused to trust the plaintiff: it was held that the allegation was not supported; for that it was the repetition of the slander by Bryce to Bryer, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he was not answerable, that was the immediate cause of the plaintiff's damage. Tindal, C. J., in delivering the judgment of the court, there says: "The substance of the plaintiff's allegation is, that, by reason of the defendant's false representations to divers persons, one John Bryer refused to trust the plaintiff. Now, the evidence necessary to support this allegation would have been, either that John Bryer was

present and heard the defendant make the representations to some person, or, at the very least, that, when the defendant made such representations, he directed them to be communicated to Bryer. But neither of these suppositions exists in fact; on the contrary, the evidence was, that the words were addressed to one Edward Bryce, and that Bryce, at a subsequent time and place, and without any authority from the defendant, repeated the representations to Bryer: the repetition of which words, and not the original statement, occasioned the plaintiff's damage. Every man must be taken to be answerable for the necessary consequences of his own wrongful acts; but such a spontaneous and unauthorized communication cannot be considered as the necessary consequence of the original uttering of the words: for, no effect whatever followed from the first speaking of the words to Bryce. If he had kept them to himself, Bryer would still have trusted the plaintiff. It was the repetition of them by Bryce to Bryer, which was the voluntary act of a free agent over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage." So, there is nothing upon this record to make it appear that the defendant ever intended that the plaintiff should know or act upon the faith of the alleged representation by him made to Bowmer: the communication of it was the unauthorized act of a free agent, over whom the defendant had no control. To entitle the plaintiff to maintain an action, the special damage of which he complains must be the legal and necessary and proximate result of the defendant's wrongful act—*Vicars* v. *Wilcocks*, 8 East, 1; *Davis* v. *Garrett*, 4 M. & P. 540, 6 Bing. 716; *Dobell* v. *Stevens*, 5 D. & R. 490, 3 B. & C. 623; *Partington* v. *Kelly*, 5 B. & Ad. 645, 2 N. & M. 460; *Langridge* v. *Levy*, 2 M. & W. 519; *Levy* v. *Langridge*, 4 M. & W. 337, in error.

1838.

PILMORE v. HOOD.

Reply.

Stammers, in reply.—With the exception of *Langridge* v. *Levy*, the cases cited have no application; and that is a distinct authority for the plaintiff. There, in case, the declaration stated that L., the father of the plaintiff, bargained with the defendant to buy of him a gun, to wit, *for the use of himself and his sons*; and the defendant then, by falsely and fraudulently warranting the gun to have been made by Nock, and to be a good, safe, and secure gun, then sold the gun to L., for the use of himself and his sons, for 24*l.*; whereas in truth and in fact the defendant was guilty of great breach of duty, and of wilful deceit, negligence, and improper conduct, in this, that the gun was not made by Nock, nor was a good, safe, and secure gun, but, on the contrary thereof, was made by a very inferior maker to Nock, and was a bad, unsafe, ill-manufactured, and dangerous gun, and wholly unsound and of very inferior materials, of all which the defendant, at the time of such warranty and sale, had notice; and that the plaintiff, *knowing and confiding in the said warranty*, used the gun, which but for the warranty he would not have done; and that the gun, being in the hands of the plaintiff, by reason and wholly in consequence of its weak, dangerous, and insufficient construction and materials, burst and exploded, whereby the plaintiff was greatly wounded, &c., and wholly by means of the premises, breach of duty, and improper conduct of the defendant, lost the use of his hand: and it was held (after verdict for the plaintiff on not guilty, and on other pleas denying the warranty and that the gun was unsafe &c.) that the action was maintainable. Parke, B., in delivering the judgment of the court of Exchequer, 2 M. & W. 530, says: "If the instrument in question, which is not of itself dangerous, but which requires an act to be done, that is, to be loaded, in order to make it so, had been *simply* delivered by the defendant, without any contract or representation on his part, to the plaintiff, no action would

1838.

FILMORE a. HOOD.

have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But, *if* it had been delivered by the defendant to the plaintiff for the purpose of being so used *by him*, with an accompanying representation to him that he might safely *so use it*, and that representation had been *false to the defendant's knowledge*, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain, upon the principle of a numerous class of cases, of which the leading one is that of *Pasley* v. *Freeman*; which principle is, that a mere naked falsehood is not enough to give a right of action; but it must be a falsehood told with an intention that it should be acted upon by the party injured; and that act must produce damage to him: if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to and then used by the plaintiff*, the like false representation being knowingly made to the intermediate person to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit." Here, the misrepresentation was communicated by Bowmer to the plaintiff with a view to a dealing between him and the defendant; and the latter, with notice of the fact, suffered the plaintiff to complete the contract.

A good cause of action disclosed upon the declaration.

TINDAL, C. J.—The principal question in this case is, whether or not the declaration upon the face of it discloses a substantive charge of fraud. I am of opinion that it does sufficiently shew a deceit or fraud practised by the defendant for which the plaintiff is by the law of this country entitled to recover compensation in damages. The declaration in substance states, that the plaintiff, being

1838.

PILMORE v. HOOD.

possessed of a public-house, one Bowmer had agreed with him for the purchase of it for a certain sum; that, in the course of the negotiation, the defendant made a false, fraudulent, and deceitful representation to Bowmer as to the receipts of the house; that, Bowmer being unable to complete the purchase, it was agreed that the plaintiff should become the purchaser in his stead; and that Bowmer communicated to the plaintiff the representation made to him by the defendant, *of which the defendant had notice:* the declaration then goes on to state, that the plaintiff, confiding in the representations so made by the defendant, went on and completed the purchase. That clearly is a substantive allegation of a fraud or deceit practised by the defendant, by reason of which the plaintiff has incurred a detriment. The first objection that has been urged on the part of the defendant, is, that it does not distinctly appear on the face of the declaration that the defendant contracted with the plaintiff on the same terms on which he had entered into the prior agreement with Bowmer. That, however, would rather be matter for the consideration of the jury when assessing the damages. But I am unable to read the declaration without coming to the conclusion that the plaintiff took upon himself the fulfilment of Bowmer's contract in all its parts: for, it states that Bowmer had contracted and agreed with the defendant for the purchase of the lease and goodwill of the premises for the sum of 1,175*l.*, and it afterwards goes on to state, that, Bowmer being unable to complete the purchase, it was agreed between the plaintiff, Bowmer, and the defendant, that the plaintiff should become the purchaser *in the room and stead of Bowmer.* I can only understand this as a transferring to the plaintiff of the contract of Bowmer, with its price and all other incidents. It appears, then, that the defendant, after he has had notice that the misrepresentation he made to Bowmer has been communicated by him to the plaintiff, permits the latter to go on with

1838.

PILMORE v. HOOD.

the contract, takes his money, and executes a conveyance of the premises to him. The defendant's motive would be the same whether the one party or the other became eventually the purchaser; the means employed would be the same, the end the same—the obtaining for the house a larger sum of money than he was conscious it was worth. I am therefore unable to distinguish the case in any degree from that which would have arisen had there been no change of parties to the contract. *Ward* v. *Weeks* is a totally different case: there, the defendant had done nothing further after the speaking of the words to Bryce: here, however, something is done by the defendant after his representation had been conveyed to the plaintiff; the contract is carried on to its completion. The case seems to me to fall expressly within the concluding words of the judgment of the court of Exchequer in *Langridge* v. *Levy*, 2 M. & Welsby, 532—"We do not decide whether this action would have been maintainable if the plaintiff had not known of and acted upon the false representation; nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale, to whom the gun might have been sold or handed over. We decide that he is responsible in this case for the consequences of his fraud whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased." I am clearly of opinion that the action is maintainable.

With respect to the plea, I think it insufficient; it does not afford an answer to the matters charged in the declaration. With knowledge that his false representation had been communicated to the plaintiff, the defendant permits the plaintiff to go on and complete the purchase. The plaintiff is entitled to judgment.

The plea no answer.

VAUGHAN, J.—I am of the same opinion. The defendant has been guilty of a fraud, from which has resulted a

Declaration sufficient.

1838.

PILMORE v. HOOD.

damage to the plaintiff, and these are sufficiently averred on the face of the declaration. After stating the agreement with Bowmer, the representation made to him by the defendant, the substitution of the plaintiff for Bowmer as the purchaser of the house, and the repetition by Bowmer to the plaintiff of the representation made to him by the defendant, the declaration goes on to aver, that, of all these premises, the defendant at and before the making of the agreement secondly mentioned, had notice; and with notice of the circumstances under which the plaintiff entered into the contract, the defendant allowed it to be completed without undeceiving him. All laws (as Lord Kenyon observes in *Pasley* v. *Freeman*) stand on the best and broadest basis which go to enforce moral and social duties. I can hardly conceive a grosser fraud than that disclosed upon this declaration. The case of *Hill* v. *Gray* seems to have gone much further than it is necessary for us to go in this case. There was no misrepresentation there, but a mere omission to remove a delusion which the plaintiff's agent knew had possessed the mind of the defendant, enhancing in his estimation the value of the picture. I think the plea in this case is no answer to the declaration.

Action maintainable.

BOSANQUET, J.—I am of the same opinion. This is an action for an alleged deceit; and the question is, whether it does or does not sufficiently appear upon the face of the record that the plaintiff has been fraudulently deceived by the defendant upon the contract of sale stated in the declaration. When the facts are stated in the order of time, (though not exactly in the order in which they appear upon the record), there cannot remain a shadow of doubt. The defendant had entered into an agreement with one Bowmer to sell him the lease and goodwill of a public-house, the business of which he falsely represented to be 180*l.* per month ready money. Bowmer being unable to complete the purchase, a negotiation was entered into

1838.

FILMORE v. HOOD.

with the plaintiff, who agreed to become the purchaser in lieu of Bowmer, the latter informing him of the representation made by the defendant as to the amount of business attached to the house, though it does not appear that Bowmer had any particular authority from the defendant to make such communication to the plaintiff. The defendant, however, it is averred, had notice of the fact of the communication having been made; and it is also averred that the defendant at the time of making the representation, and at the time he entered into the contract with the plaintiff, was aware that such representation was false. With this knowledge the defendant permits the purchase to be concluded by the plaintiff, and receives the money. Under the circumstances, the defendant was as much guilty of a deceit towards the plaintiff, as if the misrepresentation had been originally made to him. For these reasons, it appears to me that the action is maintainable, and that the declaration is not answered by the plea. *Langridge* v. *Levy* is a strong authority to shew that the action will lie.

Action maintainable.

COLTMAN, *J.*—I am of the same opinion. The case of *Hill* v. *Gray*, before Lord Ellenborough, seems to have established that there may be a fraudulent representation sufficient to avoid a contract, or to give a right of action to the party injured, without any actual declaration of him who is sought to be charged; a tacit acquiescence in a false representation. The present case, indeed, is somewhat stronger than that of *Hill* v. *Gray*, the misrepresentation here originally flowing from the defendant himself. The only doubt that has suggested itself to me has been whether the mere general averment of notice, without a specific averment that the defendant knew or supposed the plaintiff to have been acting upon the faith of the representation made by him, would suffice. But, upon consideration, I think it must be assumed that he

1838.

PILMORE v. HOOD.

had such knowledge. Upon the whole, it appears to me that the record discloses such a fraudulent representation on the part of the defendant as entitles the plaintiff to maintain the action; and that the plea affords no answer.

Judgment for the plaintiff.

MOODY *v.* MORGAN.

Thursday, Nov. 22nd.

Motion for distringas to compel appearance —affidavit, what sufficient.

ARNOLD moved for a distringas to compel the defendant's appearance to the writ of summons, upon an affidavit stating that the action was brought to recover a small sum for goods sold and delivered; that, some time previously to July last, the defendant had resided in furnished apartments at &c.; that the deponent had used his utmost endeavours to discover the present residence of the defendant by inquiring at his said last-mentioned residence, but without effect; that certain persons (naming them) had been and still were acting as attornies for the defendant; that a copy of the writ of summons was sent to those persons by the post on the 9th instant, with a request that they would enter an appearance for the defendant; that, on the 13th instant, a letter was written by the defendant shewing that the writ had come to his hands or knowledge; that, on the 19th instant, deponent received a letter from the defendant's attornies, stating that they had no intention to appear, but would, when the proper time arrived, be prepared to defend; that eight days had elapsed; and that no appearance had been entered.

He submitted that it sufficiently appeared from the affidavit that some more efficacious process was necessary to compel the defendant's appearance to the writ of summons.

PER CURIAM.—Take a rule.

1838.

Thursday, Nov. 22nd.

TARLETON *v.* DUMELOW.

A WRIT of fi. fa. against the defendant, indorsed to levy 170*l.* 19*s.* 8*d.*, was delivered to the sheriff of Staffordshire on the 11th June, 1838. Under this writ the sheriff seized and sold goods supposed to belong to the defendant, to the amount of 82*l.* On the 6th July, the sheriff, having then the money in his hands, received notice that a docket had been struck against the defendant, and that a fiat would forthwith be issued and prosecuted; and on the 17th he received notice that a fiat had issued on the 9th: both these notices being given by the solicitor to the fiat. On the 16th notices were also given by two persons who lodged in the defendant's house, that certain of the goods seized were claimed by them. On the 2nd July, the sheriff was ordered to return the writ; on the 9th, he obtained eight days' time to make further inquiries, and afterwards obtained time to return the writ, till the fifth day of this term. Accordingly, on the fourth day—

Quære, whether a notice from the solicitor that a fiat has issued against a party whose goods are in execution in the sheriff's hands, is a sufficient *claim* to entitle the sheriff to apply for relief under the interpleader act?

Quære, whether an application should not, in vacation, since the 1 & 2 Vict. c. 45, s. 2, be made to a judge at chambers?

Gray, on behalf of the sheriff, obtained a rule under the interpleader act, 1 & 2 Will. 4, c. 58, s. 6.

Dundas now appeared for the assignees of the defendant.

Lumley, for the other two claimants, and—

Archbold, for the execution-creditor.—As against the assignees, the sheriff is clearly not entitled to relief. They have made no *claim;* and it was held in *Bentley* v. *Hook*, 2 Dowl. 339, 2 C. & M. 426, that notice of a fiat having issued is not equivalent to a claim. It does not even appear now that the assignees are in a situation

1838.

TARLETON v. DUMELOW.

to make a claim. This not being an execution upon a warrant of attorney, it should be made to appear that there was an act of bankruptcy before the 11th June. [*Coltman, J.*—The assignees are not bound to establish their title upon a motion of this sort.] They should at least disclose a shadow of title. Besides, the sheriff has been guilty of laches, and therefore is not entitled to indulgence. He might have applied for this rule to a judge at chambers as early as the 27th July, the day on which the statute 1 & 2 Vict. c. 45 (26) came into operation; and, having that opportunity, he ought to have availed himself of it.

Dundas.—The assignees have done all that it was necessary for them to do, to raise a reasonable presumption of a claim in them. [It appeared from the affidavits produced by *Dundas*, that the defendant was declared a bankrupt on the 3rd August; but it was not stated when the act of bankruptcy upon which the fiat was founded, had been committed.]

(26) The second section of which—reciting that, by the 1 & 2 Will. 4, c. 58, "provision is made for the relief of sheriffs and other officers concerned in the execution of process issued out of any of his majesty's courts of law at Westminster, &c., against goods and chattels, by reason of claims made to such goods and chattels, but such relief can only be given by rule of court; and that it is expedient that a single judge should possess the power of giving relief in that respect"—enacts "that it shall be lawful for any judge of the said courts of Queen's Bench, Common Pleas, or Exchequer, with respect to any such process issued out of any of those courts, or for any judge of the court of Common Pleas of the county palatine of Lancaster, or Court of Pleas of the county palatine of Durham (being also a a judge of one of the said three superior courts), with respect to process issued out of the said courts of Lancaster and Durham respectively, to exercise such powers and authorities for the relief and protection of the sheriff or other officer as may by virtue of the said last-mentioned act be exercised by the said several courts respectively, and to make such order therein as shall appear to be just; and the costs of such proceeding shall be in the discretion of such judge."

1838.

TARLETON v. DUMELOW.

Gray, for the sheriff.—The sheriff is entitled to the relief prayed wherever a substantial and bonâ fide claim is made. In *Bentley* v. *Hook*, it did not appear by whom the notice was given: Bayley, B., there says: "If it had been clearly proved that the assignees had given the notice, perhaps it might have been sufficient; but it does not appear by whom this notice was given. It might be mere hearsay. The sheriff must shew that a claim has been made, as that is the foundation of our jurisdiction." At all events, the claims of the other two parties being admitted to be formal, there is sufficient to justify the sheriff in coming to the court.

TINDAL, C. J.—It appears to me that the sheriff is entitled to relief under the statute in respect of the claims last-mentioned, which will suffice to stay the proceedings. The claim on the part of the assignees is perhaps open to some doubt; though, where notice of the issuing of a fiat is given to the sheriff by the solicitor to the fiat, I confess I feel it difficult to put any other construction upon it than that, by giving such notice the party puts forward a claim to the goods. Still, the mere giving notice of a fiat certainly does not fall within the precise terms of the statute. But, as the sheriff is entitled to relief upon the other claims, and the parties are before us, I think we may direct an issue to be tried, the assignees being plaintiffs, and the judgment-creditor defendant. An issue will probably not be necessary for the adjustment of the claims of the other parties.

The rest of the court concurring—

Rule accordingly.

1838.

Monday, Nov. 26th.

STONE and Others *v.* COMPTON.

If any material part of the transaction between a creditor and his debtor is, with the knowledge or assent of the creditor, misrepresented to a surety, the misrepresentation being such, that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the security so given is void at law, on the ground of fraud.

The plaintiffs agreed to lend 2,600*l.* to C. & D., upon the security of a policy of insurance, a mortgage of certain leaseholds, and the joint and several promissory note of the defendants and one E. for 2,600*l.*, the plaintiffs deducting thereout a debt of 600*l.* then due to them from C. on his private account. A deed prepared in conformity with this agreement recited, amongst other things, that the entire interest in the policy was available for the purposes of the security, and *that the private debt of C. had been paid to the plaintiffs.* The nature of the agreement between the plaintiffs and C. & D. was not communicated to the defendant, but the recitals of the deed were read over in his presence when he attended at the office of the plaintiffs' attornies for the purpose of signing the note, and the note bore an indorsement identifying the sum thereby secured with the sum mentioned in the deed:—Held, that this untrue representation thus made to the defendant before he signed the note, that the private debt of C. had been paid, avoided the note.

THIS was an action of assumpsit tried before Tindal, C. J., at the sittings in London after Hilary Term, 1837, when a verdict was found for the plaintiffs for 3,000*l.*, subject to the opinion of the court upon the following case:—

The declaration contained two counts—the first on a promissory note dated the 25th November, 1831, whereby the defendant promised to pay to the plaintiffs and John Martin, since deceased, or order, on the 22nd November, 1832, 2,600*l.*, with interest, and to pay the interest half-yearly—the second upon an account stated.

The defendant pleaded—First—to the first count—that he was induced to make the promissory note, and the same was obtained from him, by the fraud, covin, and misrepresentation of the plaintiffs and John Martin, and others in collusion with him.

Secondly—to the first count, except as to 1,671*l.* 8*s.*, parcel of the moneys in that count mentioned, and the interest upon that sum—that, before and at the time of the making of the note, certain persons, to wit, Leonard Streate Coxe and George Chambers, were desirous of borrowing of the plaintiffs and John Martin a large sum, to wit, 2,600*l.*, and the plaintiffs and John Martin proposed to lend the same upon certain securities being given them for the repayment thereof, with interest, and, amongst other securities, upon the security of the said note in the first count of the declaration mentioned, to be therefore

1838.

STONE v. COMPTON.

made and signed by the defendant, as surety of and for Leonard Streate Coxe and George Chambers in that behalf; and thereupon the said note was made by the defendant as surety of and for Leonard Streate Coxe and George Chambers, and as a security for the repayment of such sum not exceeding 2,600*l.* as should be then, viz. at the time of the making the note and giving such other securities, lent and advanced by the plaintiffs and John Martin to Leonard Streate Coxe and George Chambers, with interest, and upon the terms and faith that the plaintiffs and John Martin should and would, upon the note being made, and the securities being given and executed, advance and lend to Leonard Streate Coxe and George Chambers such sum of 2,600*l.*, and that the defendant should not be liable on the note except for such sum as the plaintiffs and John Martin should then lend and advance to Leonard Streate Coxe and George Chambers on the said securities; and the defendant then made the said note upon the said terms, and not otherwise, or upon any other consideration. The defendant then averred that all the said securities, including the note, were then made, executed, and delivered to the plaintiffs and John Martin upon the terms aforesaid, and the plaintiffs and John Martin then received the note upon the terms and consideration aforesaid, and that there never was any other consideration for the making the note; that, at the time of and upon the making and executing and delivery to the plaintiffs and John Martin of the said securities, including the note, they advanced and lent to Leonard Streate Coxe and George Chambers a much less sum of money than 2,600*l.*, to wit, 1,671*l.* 8*s.*, and no more, and forbore then to lend or advance to Leonard Streate Coxe and George Chambers any further part of the said 2,600*l.*, without the defendant's knowledge or consent; and that there never was any consideration for the payment of the note, or any part of the amount thereof, except as to the 1,671*l.* 8*s.*,

1838.

STONE v. COMPTON.

with interest thereon; and the plaintiffs did not, at the time of the commencement of this suit, hold the note for or upon any consideration, except as to the 1,671*l.* 8*s.*, parcel &c., and interest thereon.

Third plea.

Thirdly—to the first count—that the defendant made the promissory note in that count mentioned as security for certain persons, to wit, Leonard Streate Coxe and George Chambers, and in order to secure monies to be paid by them to the plaintiffs and John Martin; that, after the death of John Martin, and before the commencement of the suit, Leonard Streate Coxe and George Chambers paid and satisfied monies to the amount of all the monies in the note mentioned, together with all interest due thereon; and that the plaintiffs received the same in full satisfaction and discharge of the cause of action in the first count mentioned.

Fourth plea.

Fourthly—as to 932*l.* 11*s.* 3*d.*, parcel of the monies in the first count mentioned—that, before and at the time of the making the note in the declaration mentioned, Leonard Streate Coxe and George Chambers were co-partners in trade, and that the defendant made the promissory note as surety of and for Leonard Streate Coxe and George Chambers; and the plaintiffs and John Martin, since deceased, then accepted and received the same as a collateral security for the repayment of a large sum, to wit 2,600*l.*, to be lent and advanced by the plaintiffs and John Martin, since deceased, to Leonard Streate Coxe and George Chambers, and not upon any other consideration; and the defendant made the note upon the terms, that, in case the plaintiff and John Martin, or any or either of them, should by virtue of the deed thereinafter mentioned sell the tenements and policies thereinafter mentioned, the defendant should be relieved from liability on the note to the extent of the monies which on such sale should be received by them, or any or either of them, in satisfaction of the amount of the note, or any part thereof, so far as

1838.

STONE v. COMPTON.

the same might extend and be applicable to the note. The defendant then averred, that, before the making of the note, Leonard Streate Coxe and George Chambers had applied to and requested the plaintiffs and John Martin, since deceased, to lend and advance to them, and the plaintiffs and John Martin then agreed to lend them 2,600*l.* upon the security, not only of the said note, but also upon the security and on the terms and conditions mentioned and set forth in a certain indenture [setting forth an indenture by which Coxe and Chambers mortgaged certain leaseholds and hereditaments, and assigned certain policies of insurance to the plaintiffs to secure the said sum of 2,600*l.*]: that afterwards, to wit, on &c., default was made in payment of the 2,600*l.* mentioned in the indenture, and being the sum for securing which the note was given; and thereupon the plaintiffs, according to their said interests and rights respectively in that behalf, afterwards, and after the death of John Martin, and before the commencement of this suit, to wit, on &c., under and by virtue of the said indenture, and of the powers thereby given, sold and disposed of the said leasehold premises, and the several instruments or policies of insurance, and other the premises mentioned in the indenture in that behalf, and being such securities as aforesaid, and which they were so authorized to sell respectively, at and for divers monies, to wit, to the amount of 2,000*l.*; and that, after deducting and retaining to and for themselves the plaintiffs respectively all such several costs, charges, and expenses, and monies as were in the first place to be deducted and retained, and could lawfully be deducted and retained by virtue of the indenture in that behalf, there then remained and was in the hands of the plaintiffs, and they then held and retained to their own use and benefit as the balance of the said 2,000*l.*, being the proceeds of the said several securities, a large sum, to wit, 932*l.* 11*s.* 3*d.*, for and on account, and in satisfaction and

1838.

STONE v. COMPTON.

discharge of the said 932*l.* 11*s.* 3*d.*, parcel &c., and the cause of action in respect thereof; and such last-mentioned sum thereby then became and was satisfied and discharged; and the plaintiffs from thenceforth hitherto had held the said note without value or consideration as to the last-mentioned sum.

Fifth plea.

Fifthly—as to the last count—non assumpsit.

Replications.

The plaintiffs by their replication traversed the fraud, covin, and misrepresentation alleged in the first plea, replied de injuriâ to the second, traversed the payment alleged in the third, the sale of the mortgaged property in the fourth—averring that the plaintiffs did not sell or dispose of, or cause to be sold or disposed of the hereditaments, instruments or policies, and premises in the indenture, and joined issue on the last.

Case.

The plaintiffs were bankers in London, and the defendant a general merchant residing in the same place. For a considerable period previously to the year 1825, Messrs. Coxe & Chambers, who carried on business in partnership in London, as wine-merchants, kept a banking account with the predecessors of the plaintiffs in their banking firm, which banking account was continued with the plaintiffs, until the bankruptcy of Coxe & Chambers as hereinafter mentioned. Coxe, one of the partners in the house of Coxe & Chambers, also kept with the plaintiffs a private and separate banking account for himself individually, which account was closed on the 24th February, 1830.

Loan of 800*l.* to Coxe on the security of the policy.

In 1825, John Martin, since deceased, and the plaintiffs, George Stone and Henry Stone, who then composed the banking firm, lent to Coxe on his private account the sum of 800*l.* as a specific loan on the security of an assignment of a policy on his own life effected in the Equitable Assurance Office, for 1,500*l.*, in 1809.

Sale of accumulations to the office.

In the beginning of the year 1830, and before the 24th February, the plaintiffs' firm allowed Coxe to receive from

1838.

STONE v. COMPTON.

the Equitable Assurance Office the sum of 714*l.*, being the consideration for the sale of certain additions or accumulations upon the before-mentioned policy of insurance, which would have become payable at the death of Coxe —upon the understanding that he was thereout to pay the sum of 300*l.*, in part discharge of the debt of 800*l.*, which he accordingly did, and which reduced his debt to 500*l.*

300*l.* paid off Coxe's debt.

Between April, 1825, and November, 1831, the plaintiffs John Martin (then John Martin the younger), George Stone the younger, and James Martin, had been partners in the bank; and on the 24th June, 1830, the plaintiffs' firm lent to Coxe a further sum of 100*l.*, making with the former balance of 500*l.*, 600*l.* due on his own private account. The interest upon this loan was paid on or about Christmas in every year, up to Christmas, 1830—when Coxe closed his private banking account with the plaintiff's firm—the above specific loan of 500*l.*, remaining due, and the further sum of 100*l.*, being subsequently advanced as before-mentioned.

Further loan of 100*l.* to Coxe.

In November, 1831, Coxe & Chambers, having occasion for a loan on their partnership account, entered into a negotiation with the plaintiffs in order to obtain it. Pending this negotiation, and before any definite agreement between the plaintiffs' firm and Coxe & Chambers was come to, viz. on the 11th November, 1831, the plaintiffs' firm advanced to Coxe & Chambers 300*l.* as a specific loan, which loan was on that day carried to the credit of Coxe & Chambers in their general banking account. On the 16th of the same month, it was agreed between the plaintiffs and Coxe & Chambers, through the medium of Coxe (but without the knowledge or privity of the defendant, who had not then been applied to to become surety), that the plaintiffs' firm should make a loan to Coxe & Chambers of the sum of 2,600*l.*, and that the plaintiffs' firm should thereout deduct or be repaid

Negotiation for loan of 2,600*l.* to Coxe & Chambers.

1838.

STONE v. COMPTON.

the 600*l.* due from Coxe on his private account, and secured as before-mentioned, and the interest thereon, amounting together to 627*l.* 10*s.* 8*d.*, and also the 300*l.* and interest advanced to Coxe & Chambers on the 11th of the same November; and that thereupon the policy of insurance for 1,500*l.*, which had been given for security thereof, should be transferred or stand as security for the sum of 2,600*l.*, which was to be further secured by an assignment to the plaintiffs' firm of certain leasehold premises, the property of Edward Chambers, the father of George Chambers, and of a certain policy effected in the Equitable Assurance Office for 500*l.* on the life of George Chambers, and also by a joint and several promissory note of some other persons, who were to be afterwards named by Coxe & Chambers, and to be approved of by the plaintiffs; and subsequently, but before the 25th of the same November, the defendant and Edward Chambers were accordingly proposed as sureties, and were approved of by the plaintiffs.

Mortgage deed.

In pursuance of this agreement, an indenture by way of mortgage, bearing date the 25th November, 1831, was made between Edward Chambers, as therein described, of the first part, George Chambers of the second part, Leonard Streate Coxe of the third part, and the plaintiffs' firm of the fourth part, and was executed by Edward Chambers, George Chambers, and Leonard Streate Coxe,

Recitals.

in conformity with the above agreement—*the deed reciting, among other things, that the entire interest in the* 1,500*l. policy was available for the purposes of that security, the* 800*l. formerly borrowed on it by Coxe having been repaid to the plaintiffs; but not disclosing the arrangement made as to the application of the* 2,600*l.*, *or the deduction that was to be made from it in respect of previous debts.* The deed was executed by the parties who signed it, on the day it bore date, at the office of the solicitors for

1833.

STONE v. COMPTON.

the plaintiffs' firm, and was read over in the presence of the defendant and Messrs. Coxe & Chambers.

At the same time the note upon which this action was brought was made and signed by the defendant and by Edward Chambers, of which the following is a copy:—

Promissory note.

"£2,600 0 0 "London 25th Nov., 1831.

"On the 22nd day of November, 1832, we jointly and severally promise to pay Messrs. Martin & Stone, or order, two thousand six hundred pounds, with interest, and to pay the interest half yearly, for value received."

On the back of the note the following memorandum was written at the time it was made, and before it was executed, and read over to the defendant:—

Memorandum indorsed thereon.

"The within sum of 2,600*l.* is the same sum of money as is mentioned in an indenture dated the 25th November, 1831, and made between Edward Chambers of the first part, George Chambers of the second part, Leonard Streate Coxe of the third part, and Messrs. Martin & Stone of the fourth part."

Defendant became surety for Coxe & Chambers.

The defendant was surety in the note for Messrs. Coxe & Chambers, and became so at their request, made through George Chambers, who communicated to him that the plaintiffs were to lend to the firm of Coxe & Chambers 2,600*l.*, but did not then or at any other time until long after the securities were executed, communicate the arrangement and agreement between the plaintiffs and Coxe & Chambers, or that there was any arrangement or agreement amongst the parties, further than that the plaintiffs were simply to lend the sum of 2,600*l.* to Coxe & Chambers.

Alleged fraudulent concealment.

Before the defendant signed the promissory note, the recitals of the deed were read over to him; but the plaintiffs did not, nor did their solicitor, nor did Coxe or Chambers, inform the defendant before he signed such note, that any agreement existed respecting the application of the

1838.

STONE v. COMPTON.

sum of 2,600l., or of the deduction to be made thereout; or that Coxe & Chambers, or either of them, were indebted to the plaintiffs; or that there had been any bonus received on the policy of insurance: nor did the defendant then or at any other time make any inquiries of the plaintiffs, or of their solicitor, or of Coxe & Chambers, as to the state of the accounts between the plaintiffs and Coxe & Chambers, or either of them, or as to the intended application of the loan, or as to any bonus having been received upon the policy of insurance.

State of Coxe & Chamber's account with the plaintiffs.

Coxe & Chambers had on the said 25th November, a small sum to their credit in their banking account with the plaintiffs, and they did not overdraw that sum until the 29th November, when they drew various cheques, amounting together to a sum considerably more than the balance of their banking account; and on the same 29th November, the plaintiffs' firm credited Coxe & Chambers in their general banking account, and in their pass-book, as follows:—

Cr.					Dr.				
1831.		*l.*	*s.*	*d.*	1831.		*l.*	*s.*	*d.*
Nov. 29.	Cash lent	2600	0	0	Nov 29.	By sundry loans	928	12	0
	Five days' interest allowed on 2,600*l.*—	1	8	6					

This sum of 928*l.* 12*s.* was the amount of the different loans above mentioned, and the interest due thereon; and the accounts were afterwards continued between the parties in the same pass-book and general account.

Martin died.

In January, 1832, John Martin died.

Interest on the 2,600*l.* paid down to Christmas, 1834.

Coxe & Chambers paid the plaintiffs' firm the interest on the 2,600*l.* annually from the time of the advance till Christmas, 1834; the amount of such interest having been from time to time charged and allowed in the accounts between Coxe & Chambers and the plaintiffs, and stated in the usual pass-book.

Failure of Coxe & Chambers.

In July, 1835, Coxe & Chambers stopped payment, and soon afterwards became bankrupts. On or about the 28th July in that year the plaintiffs notified such stoppage

1838.

STONE v. COMPTON.

to the defendant, and reminded him of his liability on the note.

After the bankruptcy of Coxe & Chambers, their assignees sold by public auction the two before-mentioned policies, which produced the sum of 871*l.*, viz. the policy for 500*l.* produced the sum of 36*l.*, and the policy for 1,500*l.* produced 835*l.*, which the plaintiffs received. The plaintiffs subsequently sold the leasehold premises which had been mortgaged to them, by private contract, for the sum of 270*l.*; and they also received a dividend under the bankruptcy of Coxe & Chambers on the debt of 2,600*l.*, of 364*l.* 7*s.* They gave the defendant notice of such intended sales, and also of the sums which were realized. The sum still due to the plaintiffs on the note amounted to 1300*l.* 10*s.* 7*d.*, with interest; to recover which this action was brought.

Sale of the two policies.

Sale of the leasehold premises.

The court were to be at liberty to draw any inference which a jury might have drawn.

Question.

The question for the opinion of the court, was—Whether the plaintiffs were entitled to recover any and what sum, and the verdict was to be entered on the separate issues for plaintiffs or defendant accordingly, or a nonsuit might be entered, as the court should direct.

Wilde, Serjeant (*Whateley* was with him), for the plaintiffs.—The principal question in this case arises upon the first plea, which states that the promissory note upon which the action is brought, was obtained from the defendant by fraud, covin, and misrepresentation. There is nothing upon the face of the special case to sustain that plea. The mere possibility of the defendant being misled by the recitals in a deed to which he was no party, does not amount to such a fraud in law as will destroy his contract of suretyship. The circumstance of the separate debt of Coxe being discharged out of the 2,600*l.* advanced by the bankers, in no degree increased the responsibility

1838.

STONE v. COMPTON.

of the defendant as surety. At the time the arrangement between the bankers and Coxe & Chambers was entered into, and the deed prepared, it was not known that the defendant would ever see the deed. [*Tindal*, C. J.—The plaintiffs knew the recitals were read over to the defendant before he signed the note.] The transaction was perfectly bonâ fide, and the deed was only a means of carrying it into effect.—As to the second plea—there was ample consideration: the discharge of the liability of one of the partners, was in effect an advance to the firm. It was an application of money for their purposes, and sanctioned by their adoption.—No question will arise upon any of the other pleas.

Sir W. Follett (*W. H. Watson* was with him), for the defendant.—In contemplation of law, the secret agreement between the plaintiffs and Coxe & Chambers, amounts to a fraud, which altogether relieves the defendant from his responsibility as surety. About the legal principle there can be no doubt; and a little attention to the facts will make the case perfectly plain and intelligible. In the year 1825, Coxe & Chambers were in partnership together, and had a banking account with the plaintiffs' house. Coxe had also a separate account with the plaintiffs. Upon his private account the plaintiffs had lent Coxe 800*l.*, as a security for which they held a policy for 1,500*l.* upon his life. In February, 1830, the plaintiffs allowed Coxe to sell to the office the bonuses or accumulations upon this policy, which produced 714*l.*, Coxe paying them thereout 300*l.* in part liquidation of his debt, thus reducing it to 500*l.* In June, 1830, they made him a further advance of 100*l.* This debt of 600*l.* being due from Coxe to the plaintiffs, a negotiation was entered into by Coxe & Chambers with the plaintiffs for an advance to the firm of 2,600*l.*, upon the security amongst other things of the joint and several promissory note of the defendant and Edward

1838.

Stone v. Compton.

Chambers. At the time the defendant consented to become surety, he was led to suppose that the full sum of 2,600*l.* was to be advanced by the plaintiffs to Coxe & Chambers; and when he signed the note (the indorsement on which referred to the deed), the recitals in the deed were read over to him; and from these it appeared that the transaction was a simple advance by the plaintiffs to Coxe & Chambers, nothing being said about the private debt of Coxe, or about the sale of the accumulations upon Coxe's life policy which formed part of the security. If the defendant had entered into the contract of suretyship with full knowledge of the agreement between the parties, undoubtedly he would have no right to complain. But, if the conduct of the parties was such as to induce him to entertain an erroneous impression of the degree of responsibility he was incurring, he is not bound by his contract of indemnity. The sole question in the case, therefore, is, whether the recitals in the deed did or did not contain a correct history of the transaction. Whether one party or the other benefited by the concealment, is perfectly immaterial: it is enough if the actual agreement was not communicated to the defendant. The deed would necessarily lead the defendant to conclude that a sum of 2,600*l.* was to be placed immediately at the disposal of Coxe & Chambers, and that the policy was to the full extent of its apparent value available as a security for the repayment of that sum. The fraud, too, is not confined to a mere concealment of a fact that ought to have been communicated: the deed contains a statement that the 800*l.* debt due from Coxe had been paid. At the time the entry of 2,600*l.* was made to the credit of Coxe & Chambers in the plaintiffs' books, they were debited with a sum of 987*l.* It is said that the situation and responsibility of the surety could in no degree be varied by the payment by Coxe & Chambers of the private debt of Coxe. But the complaint is, that Coxe & Chambers never had the power of exer-

1838.

STONE v. COMPTON.

cising a discretion in the matter. The transaction was such that the situation of the surety was or might have been materially altered by it: the chances of the money being repaid would be infinitely greater if the whole sum were placed at their disposal than if a portion of it were kept back in satisfaction of an old debt. The fraud does not consist in the actual prejudice, but in the possibility or probability of prejudice to the surety: it is like the case of a suppression of material information on effecting a marine policy. The principle laid down in all the cases from *Cockshott* v. *Bennett*, 2 T. R. 763, to the present time, is, that the surety is discharged if there is any concealment, any private agreement between the principal debtor and the creditor, having a tendency to alter the nature of the surety's responsibility. Thus, in *Jackson* v. *Duchaire*, 3 T. R. 551, it was held, that, if A. agree to give B. a certain sum for goods in advancement of C., any secret agreement between B. and C. that the latter shall pay a further sum, is void, as a fraud on A., although the bill of sale is made to A.; and that B. cannot recover such further sum against C. In *Glyn* v. *Hertel*, 8 Taunt. 208, 2 Moore, 134, the plaintiffs declared, that, in consideration that they would lend to S. & Co. 5,000*l.*, the defendant promised to be answerable for the same, and that they did lend the said sum, whereby the defendant became liable. The form of the guarantie was, that the defendant would be answerable to the extent of 5,000*l.* for the use of the house of S. & Co. At the time this was given, S. & Co. were indebted to the plaintiffs in a considerable sum of money, for which the plaintiffs held a promissory note drawn by S. & Co., and other bills, as a security. On receiving the guarantie, the plaintiffs cancelled the note, and delivered up the bills which they held. S. & Co. then delivered those bills back again to the plaintiffs, together with a new promissory note, but no money passed. It was held that the guarantie only contemplated future

1838.

STONE v. COMPTON.

loans, and that the transaction did not amount to a loan of money so as to charge the defendant. And in *Pidcock* v. *Bishop*, 3 B. & C. 605, 5 D. & R. 505, where a surety gave a guarantie to A. for a certain amount of goods to be sold to B., and by a secret agreement between A. and B. the latter consented to pay 10*s.* per ton beyond the market price of the goods, in satisfaction of an old standing debt due to the former: it was held that this secret agreement was a fraud upon the surety, and discharged his liability. Bayley, J., there said: "It is the duty of a party taking a guarantie to put the surety in possession of all the facts likely to affect the degree of his responsibility; and, if he neglect to do so, it is at his peril. Where by a composition deed the creditors agree to take a certain sum in full discharge of their respective debts, a secret agreement by which the debtor stipulates with one of the creditors to pay him a larger sum, is void, upon the ground that that agreement is a fraud upon the rest of the creditors. So that a contract which is a fraud upon a third person, may on that account be void as between the parties to it. Here the contract to guarantee is void, because a fact materially affecting the nature of the obligation created by the contract was not communicated to the surety." Holroyd, J., said: "The contract of the surety is not binding upon him, by reason of the plaintiffs not having communicated to the surety a secret bargain previously made by them with the vendee of the goods. The effect of that bargain was, to divert a portion of the funds of the vendee from being applied to discharge the debt which he was about to contract with the plaintiffs, and to render the vendee less able to pay for the iron supplied to him. The plaintiff and defendant therefore were not on equal terms. The former, with the knowledge of a fact which necessarily must have the effect of increasing the responsibility of the surety, without communicating the fact to him, suffers him to give the guaranty. That

1838.

STONE v. COMPTON.

was a fraud npon the defendant, and vitiates the contract." And Littledale, J.—"I think that a surety ought to be acquainted with the whole contract entered into with his principal." *Mayhew* v. *Crickett*, 2 Swanst. 193, is an authority to the same effect.

Wilde, Serjeant, in reply.—This is not the case of a formal guarantie; therefore the cases applicable to instruments of that nature have no bearing upon the argument. Where the contract is in the general form of a bill or note, no communication at all need be made to the surety; it is enough if the transaction be bona fide. The case of an underwriter is altogether different: for he is supposed to possess no knowledge but what the assured chooses to communicate to him. The acceptor of an accommodation bill is a mere surety for the drawer; and it has been held repeatedly (over-ruling *Laxton* v. *Peat*, 2 Camp. 185), that giving time to the drawer does not discharge the acceptor (27). The transaction in this case between the plaintiffs and Coxe & Chambers was perfectly bona fide; and the plaintiffs might fairly expect that Coxe & Chambers would make every communication that was necessary or proper to be made. No obligation was imposed upon the plaintiffs to communicate to the defendant the contents of the deed; they were not bound to apprize him that there existed any securities in his relief. If the representation arising out of the reading of the deed in the defendant's presence professed to have been made for the purpose of inviting an exercise of his discretion, no doubt it would form an essential feature in the case. But the fact is otherwise: the defendant had consented to become surety long before he heard of the existence of any deed.—No difficulty arises from

(27) See Raggett v. Axmore, 4 Taunt. 730; Fentum v. Pocock, 5 Taunt. 192, 1 Marsh. 14; Kerrison v. Cooke, 3 Camp. 362; Rolfe v. Wyatt, 5 C. & P. 181.

from the mode of dealing with the policy. [*Vaughan*, J. Would not any man reading the recitals in the deed conclude that the policy with all its accumulations formed part of the security?] Certainly not. It is well known that bonuses are declared on life policies at certain periods, and that they are commonly sold, the fact of the sale being indorsed on the policy; so that a policy can never pass for more than its real value.—With respect to the cases cited on the part of the defendant—*Jackson* v. *Duchaire* was a case of palpable fraud: there was an intentional concealment of a material fact. *Pidcock* v. *Bishop* was the case of a special guarantie; the facts do not apply to this case. In *The Bank of Ireland* v. *Beresford*, 6 Dow, 238, it was held that if a bond creditor enters into a binding contract with the principal debtor to give him further time to pay, without the concurrence of his surety, the surety is discharged, because the creditor has put it out of his own power to enforce immediate payment, where the surety would have a right to require him to do so. But in *Price* v. *Edmunds*, 5 M. & R. 287, 10 B. & C. 578, in an action by the payee against the maker of a promissory note, the plaintiff proved a joint and several note made by the defendant and another person. The defendant then proved that he was a mere surety, having become a party to the note at the request of the other person, who was indebted to the plaintiff, and that the note not having been paid when it became due, the plaintiff, in Hilary Term, 1828, brought an action against the principal, which being about to be tried at the Spring Assizes, 1828, the plaintiff took a cognovit for the debt, payable by three instalments, the first on the 28th April, the others in May and June; but, if the plaintiff failed in payment of any of these instalments, the plaintiff was to be at liberty immediately to enter up judgment and issue execution for the whole sum. The first instalment was not duly paid: and it was held, that, as

1838.

STONE v. COMPTON.

the plaintiff, if he had proceeded in the action, could not have obtained judgment and issued execution before the 28th April, which was the fifth day of Easter Term, the plaintiff did not by taking the cognovit give any time to the principal debtor. In *Nichols* v. *Norris*, 3 B. & Ad. 41, where A. gave a promissory note, payable to B. (for which A. had received no consideration), as a security for goods to be sold to B. on credit, and B. indorsed the note over to the creditors, and afterwards executed a deed of composition with the creditors, by which he undertook to pay his debt to them by instalments, and it was stipulated that they should not be prevented by that arrangement from suing on any securities which they held, and that on any default in paying the instalments the deed should be void: it was held that the delay granted to B. by this agreement, did not discharge A.: and Lord Tenterden said: "Deeds of this kind are very common, and it is very usual to insert clauses like the present, reserving the remedy against sureties. If we were to hold, that, notwithstanding such a promise, the liability of a person in the situation of this defendant was gone, it might prevent such deeds from being entered into, which would often be against the interests of all parties. In other respects I think there is no material difference between this case and *Fentum* v. *Pocock*." In *Free* v. *Hawkins*, 8 Taunt. 92, 1 Moore, 535, in assumpsit on a promissory note payable twelve months after date to the defendant, and indorsed by him as a security for the debt of the maker—it was held that the defendant was entitled to notice of non-payment by the maker, and that evidence of a parol agreement at the time of making and indorsing the note, that payment should not be demanded till after the sale of the estates of the maker, could not be received as a waiver of the right to such notice. And Dallas, J., said: "If parties mean to vary the legal operation of an instrument, they ought to express such variance: if they

do not express it, the legal operation of the instrument remains."

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—The main question in this case, and which arises upon the first plea to the count upon the promissory note, is this, whether the promissory note was obtained from the defendant under circumstances which are deemed *in law* to amount to covin (for, there is no suggestion whatever of any intentional fraud or misrepresentation on the part of the plaintiffs personally), so as thereby to avoid the validity of the security in the hands of the plaintiffs.

The promissory note having been given by the defendant as a security for the debt of Messrs. Coxe & Chambers, and the note still remaining in the hands of the plaintiffs, the original payees, the consideration upon which it was given to them, and the several circumstances under which the defendant was induced to enter into it, are the subject of inquiry and investigation in the present action. And with respect to the nature of such inquiry, and its bearing and effect on the validity of the instrument, we cannot see any sound legal distinction arising from the form of the security itself, that is, whether such security is taken in the form of a promissory note, or as an ordinary guarantie for the payment of the debt of a third person; for, the liability of the maker of the note and of the guarantor, depends precisely on the same event, namely, the default of the principal debtor to make good his payment; and the extent of the surety's liability is precisely the same on either instrument: so that there seems no reason, and no authority has been cited to the effect that the validity of the two instruments should not stand upon precisely the same footing, so far as depends on the circumstances under which the same were given.

Now, the principle to be drawn from the cases to which

1838.

STONE v. COMPTON.

reference has been made in the course of the argument, we take to be this—that, if, with the knowledge or assent of the creditor, any material part of the transaction between the creditor and his debtor is misrepresented to the surety, the misrepresentation being such, that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the security so given is void at law, on the ground of fraud.

The question, therefore, becomes this—whether, upon the facts stated in the special case, there appears to have been any such misrepresentation on the part of the plaintiffs.

It is perfectly true, as urged by the counsel for the plaintiffs, that the agreement between the plaintiffs and Coxe & Chambers, under which the former were to be allowed to deduct out of the advance of the 2,600*l.* the old debt of 800*l.* due from Coxe on his separate account, was entered into before any application had been made to the defendant to become surety; and also that Coxe & Chambers never communicated to the defendant until long after the transaction that any such arrangement had been made, or indeed any other than that the plaintiffs were simply to lend them 2,600*l.*: and, if the matter had rested here, no objection, either on the ground of suppression or misrepresentation, could have been urged against the validity of the note. The plaintiffs were not to be made responsible for the communication or want of communication between their debtor and the surety, unless they are shewn to be agreeing to it; and, for any thing which appears as to this part of the transaction, they were ignorant that a correct statement had not been made to the defendant. But it appears from the special case, that, at the time of signing the note, the principal debtors, Coxe & Chambers, and the defendant, were at the office of the

plaintiffs' attorney, where the deed of the 25th November was read over in their presence: the case stating expressly, "that, before the defendant signed the promissory note, the recitals of the deed were read over to him;" and that, upon the same occasion, and before the note was signed by the defendant, the memorandum was indorsed upon the note, stating that the sum mentioned in it was the same sum as that mentioned in the deed. Now, we think the construction, and the only construction which can be put upon the recitals in the deed, is, that the former debt of 800*l.* due to the plaintiffs from Coxe on his separate account, and the repayment of which was secured by Coxe's policy for 1,500*l.*, *had been at that time paid by Coxe to the plaintiffs*; and that the sum agreed to be advanced by the plaintiffs to Coxe & Chambers upon a new loan, was *the full and entire sum of* 2,600*l.* We cannot consider these recitals in any other light than as a direct representation made to the defendant before the note was signed, not indeed personally by themselves, but by the agents of the plaintiffs employed in carrying the negotiation for the loan into effect, and consequently by whose acts the plaintiffs are bound; and that this representation was untrue in a material respect, namely, that the private debt of Coxe had not been paid at the time of the execution of the deed; and that the entire sum of 2,600*l.* was by the private stipulation between the parties, not to be advanced to or placed to the credit of Coxe & Chambers, but only the sum of 2,600*l.* minus the amount of the debt due from Coxe to the plaintiffs.

And we think ourselves bound, upon every legal principle of reasoning, to assume, that, as the defendant was present when the recitals of the deed were read over to him, he must have signed the note with a full knowledge and understanding of the facts therein stated, and in the faith and confidence that the statement was true. The recitals were read over to him for the purpose of making

1838.

STONE v. COMPTON.

him acquainted with the state of the account between Coxe & Chambers and the plaintiffs, and with the collateral securities given by Coxe & Chambers, which he the surety might, if it became necessary, call to his aid and indemnity: and his attention must have been called to the recitals in the deed, by the circumstance of the memorandum indorsed on the note, which could be placed there for no other purpose than to connect the note with the transaction stated in the deed.

Then, as it appears to us that the representation as to the repayment of the debt due from Coxe, and the amount of the new loan to Coxe & Chambers, was untrue, and that such misrepresentation related to a fact material to the surety's interest, we think the promissory note is therefore void. And, such being our opinion on this point, it becomes unnecessary to discuss the second objection which has been urged, as to the misrepresentation in the recitals of the deed of the then existing state and value of Coxe's policy; on which point, however, if it had been necessary, we should have been ready to declare our opinion.

We think, therefore, judgment should be entered for the defendant on the second plea.

Judgment accordingly.

Monday, Nov. 26th.

BOTTOMLEY *v.* FORBES.

By a charterparty made in London the defendant engaged to ship on board the plaintiff's vessel at Bombay a full cargo at a certain price per ton—cotton to be calculated at fifty cubic feet per ton, and other goods according to the scale of tonnage of the East India Company. In an action of assumpsit for the freight:—Held, that it was competent to the defendant to give evidence of a custom at Bombay to calculate the freight upon a measurement of the bales of cotton immediately after they had been submitted to hydraulic or other pressure, so as to reduce them to the smallest practicable bulk.

Held also, that it was competent to the plaintiff, in order to shew the unreasonableness of the alleged custom, to give evidence in reply, that the cotton had increased in bulk 15 per cent. upon the screw measurement by the time it was put on board the vessel.

ASSUMPSIT for freight on a charterparty, dated the 23rd May, 1836, and made in London, whereby the de-

1838.

BOTTOMLEY v. FORBES.

fendant undertook to ship on board the Royal Admiral at Bombay for London a full cargo not exceeding what the vessel could reasonably stow and carry, paying freight 4*l.* 15*s.* per ton—"cotton to be calculated at fifty cubic feet per ton, and all other goods according to the scale of tonnage of the East India Company."

The cause was tried before Coltman, J., at the sittings in London after last Hilary Term.

Under the above charterparty the defendant shipped on board the Royal Admiral a cargo of cotton consisting of 1575 bales and 32 half bales, measuring, according to the Bombay measurement hereinafter mentioned, 355 tons. The vessel arrived in London and discharged her cargo between the 23rd and 27th June. The measurement, which took place immediately, and was completed by the 3rd July, exhibited a tonnage of 457 tons 3 feet 1 inch. The question was whether the freight was to be paid according to the Bombay or the London measurement: the defendant had paid freight upon the former measurement, and the action was brought to recover the difference.

It appeared that cotton before it is shipped is subjected to hydraulic pressure, by which the bulk of a bale is reduced from twelve or thirteen cubic feet to about one foot eight inches. In this state it is corded, and measured by means of callipers, the measurement being taken from within the ropes. Within twenty-four hours after the bale comes from the press, it expands to the extent of about 15 per cent., and it continues to expand every time it is moved. Considerable expansion takes place also after the cotton comes out of the vessel's hold. In the present case the cotton was not shipped within twenty-four hours after it left the press. There are three modes of estimating the tonnage of cotton at Bombay: first, taking it at 14 cwt. to the ton; secondly, at 4½ bales; thirdly, at fifty cubic feet. Disputes having constantly arisen as to the mode of measuring cotton, a new mode of

1838.

BOTTOMLEY v. FORBES.

measuring had been agreed on at a general meeting of the merchants at Bombay (which had not come into practice at the time this charterparty was made), the effect of which was a reduction of the market rate of freight from 4*l.* 15*s.* to 3*l.* per ton.

Evidence objected to as improperly received.

On the part of the defendant, several witnesses were called for the purpose of proving that freight was always paid according to the Bombay measurement, that the cotton was always pressed into the smallest possible space, and that the bills of lading signed by the captain specified the screw measurement.

This evidence was objected to on the part of the plaintiff, on the ground that the charterparty was perfectly unambiguous and required no explanation; and it was contended that freight was to be paid for the space occupied in the ship's hold, and that, to calculate it upon the temporary dimensions given to the cotton by artificial means, and which lasted no longer than the pressure giving those dimensions continued, would be to vary the effect of the language of the charterparty.

The learned judge, however, permitted the witnesses to be examined. They admitted that it was not unusual for these charterparties to be made at Bombay, and to express that freight should be paid according to the Bombay measurement.

Evidence improperly rejected.

The defendant's case being closed, it was proposed on the part of the plaintiff (in order to found an argument that the custom set up by the defendant, if admissible, was unreasonable and unjust, and that the parties were not acting under it,) to offer evidence to shew the actual dimensions of the cotton at the time of shipment, and that the captain refused to receive it at the screw measurement. This evidence was objected to on the part of the defendant, on the grounds that, the contract standing upon the charterparty, the acts of the captain were irrelevant, and that the proposed evidence should have been given as a part of

1838.

BOTTOMLEY v. FORBES.

the plaintiff's case. On this latter ground, the learned judge declined to admit the evidence.

It was also proposed, on the part of the plaintiff, to prove that the captain, when the goods were alongside the vessel, requested the defendant's agents to attend the measurement on board, and that a bill of lading specifying the measurement on board as well as that at the screw, was delivered to the agents. This was objected to on the same ground, and also rejected.

The learned judge left it to the jury to say whether or not the charterparty incorporated the usage—telling them, that, if so, the usage was in his opinion sufficiently proved. The jury returned a verdict for the defendant.

Wilde, Serjeant, in Easter Term last, obtained a rule nisi for a new trial, on the grounds—first, that the evidence given on the part of the defendant, as to the custom at Bombay, was improperly received—secondly, that, if well received, it did not support the custom set up—thirdly, that the evidence offered in reply was improperly rejected. The arguments urged by the learned Serjeant were in substance as follow:—

1. Evidence improperly received.

1. The only ground upon which a written contract is open to explanation as to usage, is, that the contracting parties are understood to be dealing with reference to the usage; and the usage must be one that obtains at the place where the contract is made, unless otherwise expressed. The usage must also be certain and reasonable. That relied upon in the present case is most uncertain and most unreasonable—making the freight depend upon the force of the press or screw in each merchant's warehouse, the quality and elasticity of the lashings, the number of removals, the condition of the atmosphere, and the length of time that may elapse between the compressing of each bale and its shipment. Whereas the uncertainty would in a great degree be obviated by taking the mea-

1838.

BOTTOMLEY v. FORBES.

surement on board, and thus ascertaining the space occupied in the ship's hold. In *Moller* v. *Living*, 4 Taunt. 102, the bill of lading of a cargo shipped at Dantzic on board a Prussian ship, expressed it to be 100 lasts in 1092 bags. The consignee had purchased it for that quantity, English measure, but it did not amount to that quantity by the Dantzic measure, which is larger. It was held that the master was entitled to freight according to the measure in the bill of lading, and exceeding the freight computed by Dantzic measure.

2. Custom not supported by the evidence.

2. The alleged usage was not supported by the evidence. It appeared that charterparties are usually made at Bombay, providing for the payment of freight at the screw measurement. There was no evidence of freight ever having been paid according to the screw measurement, except where the charterparty or the bill of lading so expressed it. It was in all cases matter of agreement.

3. Evidence in reply improperly rejected.

3. The evidence rejected would have precisely raised the question whether the usage was a reasonable one or not. The case was opened as a common case of a claim for freight on a delivery in the port of London. The plaintiff repudiating the custom, it was not necessary for him to offer any evidence in anticipation of the custom to be set up by the defendant. But, when set up, it clearly was competent to the plaintiff, by way of reply, to shew the extent of the expansion, and the consequent unreasonableness of the custom.

Sir W. Follett and *R. V. Richards*, shewed cause.—

1. Evidence admissible.

1. The charterparty being silent as to the place of measurement, this is precisely one of those cases where the usage of the trade is admissible for the purpose of interpreting a contract in itself abiguous—2 Phillipps on Evidence, 738, 764; *Benson* v. *Schneider*, 7 Taunt. 272, 1 Moore, 21; *Gibbon* v. *Young*, 2 Moore, 224; *Taylor* v. *Briggs*, 2 C. & P. 525; *Haynes* v. *Halliday*, 7 Bing. 587,

5 M. &. P. 572; *Smith* v. *Wilson*, 3 B. & Ad. 728; *Bold* v. *Rayner*, 1 M. & W. 343. In *Gibbon* v. *Young*, Gibbs, C. J., says: "A written mercantile instrument may be explained by usage, but cannot be altered, nor can any new terms be introduced to vary the nature of the original contract." And Dallas, J.: "It has been long established that both policies of assurance and charterparties of affreightment must be construed according to mercantile usage." And in *Smith* v. *Wilson*, 3 B. & Ad. 733, Parke, J., says: "The rule deducible from the authorities on this subject is correctly laid down in 3 Starkie on Evidence, 1033: 'Where terms are used which are known and understood by a particular class of persons in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of *applying* the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties in framing their contract had made use of a foreign language, which the courts are not bound to understand. Such an instrument is not on that account void; it is certain and definite for all legal purposes, because it can be made so in evidence through the medium of an interpreter. Conformably with these principles, the courts have long allowed mercantile instruments to be expounded according to the custom of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters.'" So, in Abbott on Shipping, 5th edit. 188, it is said that "the general rule which our courts of law have adopted in the construction of this, as well as other mercantile contracts, is, that the construction should be liberal, according to the real intention of the parties, and conformableto the usage of trade in general, and of the particular trade to which the contract relates." "Accordingly (p. 208), at the trial before Lord Kenyon of an action on a charterparty, by which it was stipulated that the merchant should have the exclusive use of the ship

1838.

BOTTOMLEY v. FORBES.

outwards, and the exclusive privilege of the cabin, the master not being allowed to take any passengers; at which trial the defendants insisted, that, under a charter-party so worded, it was the constant usage of trade to allow the master to take out a few articles for private trade; his lordship suffered evidence to prove this usage, observing, that although primâ facie the deed excluded this privilege, yet he thought the deed might be explained by uniform and constant usage, the usage being a tacit exception out of the deed"—*Donaldson* v. *Forster*, Guildhall Sittings after Michaelmas Term, 29 Geo. 3. The usage here proved was not inconsistent with the contract, but was necessary to shew it meaning. *Moller* v. *Living* was the case of an implied contract. The evidence of the usage was properly received.

2. Custom proved.

2. That evidence shewed an invincible usage of the cotton trade at Bombay to measure the bales at the screw. It is true some of the witnesses stated that the mode of measuring was usually mentioned in the charterparty. But the whole, including the reasonableness or unreasonableness of the custom, was a question for the jury; and they have properly dealt with it.

3. Evidence in reply properly rejected.

3. The evidence offered in reply was properly rejected. The case opened on the part of the plaintiff, was, a claim to freight calculated upon the measurement of the cotton when landed here: no claim to an intermediate measurement was ever suggested, until the defendant's case was closed; and then the evidence was not tendered for the purpose of contradicting the usage established by the defendant's evidence: it was proposed to call the captain for the purpose of shewing that he had refused to receive the goods at the screw measurement, and that bills of lading were given to the shippers stating the amount of the measurement at the screw as well as that on board the ship. That, if evidence at all, was clearly not admissible in reply; it should have been made a part of the plaintiff's

1838.

BOTTOMLEY v. FORBES.

original case. The acts of the captain, however, were wholly immaterial: the parties are bound by the contract that appears upon the face of the charterparty.

Wilde, Serjeant, and *Martin*, in support of the rule.—

First point.

1. The basis of the contract is the capacity of the vessel; the owner is to receive and to be paid for a *full* cargo, estimating cotton at fifty cubic feet to the ton. There is nothing at all ambiguous in this; nothing to shew that the charterparty speaks in a language that has received amongst merchants a peculiar or unusual meaning. The general rule, from which the courts have never intended to depart, undoubtedly is, that evidence may not be given to add to, vary, or contradict a written contract; but it may be to explain it. It is, however, a misapplication of that rule to say that such evidence may be given here, where there is no ambiguity on the face of the instrument. There are many cases of mercantile contracts which must of necessity be construed with reference to mercantile usage: for, instance, a sailing with convoy from the usual place of rendezvous (as, Spithead for the port of London), is a *departure* with convoy, within the meaning of a warranty to depart with convoy—*Lethullier's* Case, 2 Salk. 445; *Gordon* v. *Morley*, 2 Stra. 1265; Emerigon, Vol. 1, p. 166. There the contract does not admit of performance according to its strict terms. But, where the language of a written contract is plain and unambiguous, it cannot be controlled by any usage or custom of the place. Thus, in *Noble* v. *Durrell*, 3 T. R. 271, it was held that a custom that every pound of butter sold in a particular market town shall weigh eighteen ounces, is bad. Lord Kenyon there says: "In deciding this question, I wish not to be understood to say that a custom may not prevail that butter shall be sold in *lumps* or *yards* containing any given number of ounces: but the question now before the court is, whether a custom in Southampton

1838.

BOTTOMLEY v. FORBES.

that a *pound* shall contain *eighteen ounces* can be supported in law. To say that it can would be to violate all the rules of language as long as the acts of parliament which have been cited are to regulate this subject. This has engaged the attention of the legislature for five centuries, and they have thought it of the utmost importance that there should be one standard of weights and measures throughout the kingdom. But it is said that there is no objection on the score of reason and convenience why this rule should not be relaxed in a particular town; because, when the exception is once established, the inhabitants of that town will square their notions accordingly. But is it material to consider whether the exception to the rule will be confined to butter only: if this custom can be established, it may also be extended to hops in Kent, or to any other commodity in any other part of the kingdom, and thus the greatest confusion will be introduced on a subject that ought to be particularly plain. So one measure might prevail at Pool, another at Dartmouth, &c., and thus foreign merchants would never know on what terms they were treating. It might be as well contended that a custom could prevail in a particular place, that a less number of days than seven should constitute a week; or that a less space of ground than an acre should be called an acre." The present case goes further: it seeks to control the written contract by the admission of evidence varying the mode of computing and ascertaining the measurement and weight of the goods, not only according to the mode of compressing adopted at the place where the cottons are loaded, but according to the mechanical force employed in the warehouse of each individual merchant. So, in *Yates* v. *Pym*, 6 Taunt. 446, 2 Marsh. 141, it was held, that, on a warranty of prime singed bacon, evidence was not admissible of a practice in the bacon trade to receive bacon to a certain degree tainted, as prime singed bacon; nor of a practice to preclude the purchaser from

all remedy if he does not discover and point out the defect by an early day. In 4 Starkie, 1036, it is said that, "The legitimate object of extrinsic evidence in such cases, as consistent with general principles, seems to be to explain terms (in order to their due application) which are not intelligible to all who may understand the language, but which nevertheless have acquired, by virtue of habit, custom, and usage, a known definite sense and meaning amongst a particular class of persons, which can be well ascertained by means of the extrinsic testimony of those who are conversant with the peculiar use of those terms. The witnesses for this purpose may be considered to be the sworn interpreters of the mercantile language in which the contract is written. Beyond this, however, the *principle* does not extend; merchants are not prohibited from annexing what weight and value they please to words and tokens of their own peculiar coinage, as may best suit their own purposes, but they ought not to be permitted to alter and corrupt the sterling language of the realm. If they use plain and ordinary terms and expressions, to which a natural unequivocal meaning belongs, which is intelligible to all, then, it seems, according to the great principle so frequently adverted to, that plain sense and meaning ought not to be altered by evidence of a mercantile understanding and usage to the contrary." *Donaldson* v. *Forster*, which is the only case to be found where evidence has been admitted to explain a contract the terms of which were not ambiguous, is inconsistent with this general principle so well laid down and so often recognised, and must be esteemed a departure from the usual accuracy of the very eminent judge who so ruled. The other cases relied on upon the other side are all cases of latent ambiguity, forming exceptions out of the general rule. Here, the court is called upon to allow evidence to be received to contradict the specific terms of the contract.

1838.

BOTTOMLEY v. FORBES.

2. Supposing the evidence to have been properly received, it did not establish the alleged custom. None of the witnesses proved a payment of freight upon the screw measurement, unless there was an agreement in the particular case indorsed on the bill of lading.

Second point.

Third point.

3. The evidence offered in reply was pertinent to the repelling the case set up by the defendant: it was offered for the purpose of shewing that the parties were not dealing upon the footing of any custom such as that alleged, and that the custom was uncertain and unreasonable, and consequently bad. The evidence therefore was incorrectly rejected.

TINDAL, C. J.—There is only one point in this case upon which we entertain any doubt. We are satisfied that the evidence as to the custom was properly received; but we doubt whether the evidence tendered in reply ought not to have been admitted.

Cur. adv. vult.

TINDAL, C. J., now delivered the opinion of the court:—

Evidence to explain the contract admissible.

At the conclusion of the argument in this case, we stated our opinion, that, so far as related to the first objection, we thought the case fell within the general rule, that, where a doubt was raised by evidence upon the meaning of a mercantile contract, evidence of the usage or course of trade at the place where the contract was to be carried into effect was admissible to explain or remove such doubt; and we still continue of that opinion, and hold the evidence which was given by the defendant at the trial of this cause to be admissible.

Evidence in reply.

But, with respect to the evidence tendered by the plaintiff in the way of reply, we think such evidence ought to have been received: for, as it appears to us, the evidence tendered had a direct bearing on the point whether

1838.

BOTTOMLEY v. FORBES.

the usage set up was a reasonable usage or not. Evidence of the extent of the difference between the measurement on the merchant's premises and the measurement at the time of shipment, might be material to enable the judge to form his opinion upon the reasonableness of the usage; and, if the usage should appear to be in a high degree unreasonable on this account, such evidence might also have weight with the jury on the question whether the usage did or did not exist in fact.

We think, therefore, upon this ground the cause must go down to a new trial.

Rule absolute.

REEVES *v.* CAPPER and Another.

Monday, Nov. 26th.

One W., the master of a vessel belonging to the defendants, on the eve of a voyage, in consideration of an advance of 50*l.*, by a memorandum dated the 23rd December, 1836, "made over to them as their property, until the sum advanced should be repaid, his chronometer and all his nautical instruments then on board the vessel, they allowing him the use of the same for the voyage." The chronometer was at this time in the hands of the makers for safe custody and regulation: the transfer or charge was not communicated to them. W. used the chronometer for the voyage, and returned it to the makers as before, and afterwards pledged it to the plaintiff as security for a debt:—Held, upon an issue under the interpleader act to try the property in the chronometer, that it vested in the defendants under the agreement of the 23rd December, 1836, until the advance was repaid.

THIS was an issue directed by the court under the interpleader act, to try the right to a chronometer. The declaration was in trover: the plea denied the plaintiff's property in the chronometer.

At the trial before Coltman, J., at the sittings in London after the last Hilary Term, the facts that were given in evidence were as follow:—One Wilson, the original owner of the chronometer, and master of a vessel called the Don Giovanni, belonging to the Messrs. Cappers, being about to proceed on a voyage, obtained from his owners an advance of money upon the security of the chronometer, and signed the following memorandum, addressed to them:—

"23rd December, 1836.

"In consideration of your advancing me 100*l.* on account of this voyage, instead of the usual advance of

1838. REEVES v. CAPPER.

50*l.*, I make over to you as your property, until the said sum is repaid, my chronometer, and all my nautical instruments now on board the Don Giovanni, *you allowing me the use of the same for this voyage.*"

At the time this transaction took place the chronometer was in the possession of Messrs. Barraud, of Cornhill, it having been deposited with them by Wilson, in the usual course, for safe custody and to be regulated and kept going whilst the vessel remained in port. On signing the memorandum Wilson went to Barrauds' with a clerk of the defendants, obtained the chronometer from them, and handed it to the clerk, by whom it was delivered back to Wilson to be used by him on the voyage pursuant to the agreement. On Wilson's return home in July, 1837, the defendant's clerk went on board the vessel and received from Wilson the nautical instruments, but not the chronometer, that having been already taken by Wilson to Messrs. Barrauds'. This was the defendant's case.

On the part of the plaintiff, the case was as follows:—Reeves had been the attorney for the plaintiff in a cause of *Wain* v. *Wilson*. Judgment had been obtained against Wilson in this cause, and a writ of fi. fa. issued. Reeves finding Wilson in a state of extreme pecuniary embarrassment, took upon himself, without the sanction or knowledge of his client, to withdraw the execution, upon Wilson's depositing with him the chronometer in question and certain sugar warrants which he held. The plaintiff accordingly received from Wilson the following note, dated the 24th of August, 1837, and addressed to Messrs. Barrauds:—

"Deliver to Mr. C. Reeves my chronometer No. 22, which his clerk will explain the reason for doing. It will remain in your hands as his property until the arrangement of some little transactions between us: therefore, you will please to keep it still going, as I shall have it replaced in my name in a few days."

1838.

REEVES v. CAPPER.

This document was taken to Messrs. Barrauds' by Reeves's clerk; the chronometer was placed in his hands, and was delivered by him to Messrs. Barraud, who agreed to hold it for Reeves under the last-mentioned order.

There was no evidence to shew that Messrs. Barraud had any notice of the transaction between Wilson and Messrs. Capper until November, 1837: this was the only objection to their title.

On the part of the defendants it was contended that no property passed to the plaintiff under the memorandum of the 24th August, 1837—first, because it was not stamped—secondly, because no consideration appeared upon the face of it—and thirdly, that there was no consideration in fact, there being no pretence for saying that the plaintiff had made himself responsible to his client for Wilson's debt by the course he had adopted.

The learned judge was of opinion that the property in the chronometer was in the defendants; but he directed a verdict to be entered for the plaintiff, reserving leave to the defendants to move that it might be set aside, and a verdict entered for them, if the court should so think fit.

Wilde, Serjeant, accordingly, in Easter Term last, obtained a rule nisi, on the grounds urged at the trial.

F. Kelly and *Petersdorff*, on a former day in this term, shewed cause.—By the delivery order of the 24th August, the chronometer was pledged to the plaintiff, and, possession accompanying the pledge, the property in the chronometer clearly vested in him, unless overridden by the previous transaction with the defendants. The jury have expressly found that Messrs. Barraud had no notice of the defendants' lien. A mere pledge, unaccompanied by delivery of possession, sounds merely in contract: it passes no property. When the defendants allowed Wilson to have possession of the chronometer for the voyage,

1838.

REEVES v. CAPPER.

they forfeited any lien they might before have had upon it—*Kinloch* v. *Craig*, 3 T. R. 783. [*Tindal*, C. J.—The question is quo intuitu the chronometer was placed in the hands of Wilson. He was the defendants' servant: in permitting him to use it in the navigation of their ship for the voyage, they could not have contemplated giving up any right.] On Wilson's return from the voyage, he had the undisputed control over the articles: it was deposited by him at Barrauds', and in his own name, and subject to his own order. There can be no available transfer by gift of a personal chattel except by actual delivery or by deed—*Reed* v. *Blades*, 5 Taunt. 212; *Irons* v. *Smallpiece*, 2 B. & Ald. 551. In *Ryall* v. *Rolle*, 1 Atk. 168, Lord Hardwicke says: "As to the possession of goods, I have no way of coming to the knowledge of the owner, but by seeing who is in possession of them."

Sufficiency of consideration.

The consideration for the transfer to Reeves was ample. Reeves was the attorney for one Wain, who had sued Wilson to judgment, and issued an execution, under which Wilson's goods were about to be seized. Reeves took upon himself Wilson's liability to his client, and received from Wilson the sugar warrants and the order on Messrs. Barraud for the delivery to him of the chronometer. The mere withdrawal of the execution was consideration enough. At all events, if the defendants had intended to impeach the consideration, they should have requested the learned judge to put it to the jury.

Want of stamp.

The order of the 24th August, 1837, required no stamp. It was not the *agreement* between the parties: that was by parol. An "agreement, minute, or memorandum of agreement" is not liable to stamp duty, unless it constitutes the binding contract between the parties—*The King* v. *The Inhabitants of St. Martin, Leicester*, 4 N. & M. 202; *Parker* v. *Dubois*, 7 C. & P. 406.

Wilde and *Talfourd*, Serjeants, in support of the rule. The notion that once obtained, that the absence of pos-

1838.

REEVES v. CARTER.

possession invalidates an assignment of chattels, is no longer considered law. The subject was considered in *Martindale v. Booth*, 3 B. & Ad. 498. There, A., being indebted to B. in the sum of 10*l.* for goods, applied for a further supply upon credit, and for a loan. B. refused to grant either without security; and it was then agreed that A. should give a bill of sale of his household furniture and fixtures, and that B. should give him credit for 200*l.* on that security. Before the bill of sale was executed, B., upon the faith of such agreement, advanced to A. 90*l.* in money and goods; and afterwards, on the 8th May, 1828, A. executed a bill of sale, whereby, in consideration of the debt of 100*l.*, he bargained and sold to B. all his (A.'s) household goods and furniture, &c., with a proviso, that if A. should pay the 100*l.* by instalments, the first of which was to be due on the 7th June, the deed should be void; but, in default of payment of any of the instalments at the times appointed, it should be lawful, although no advantage should have been taken of any previous default, for B. to enter upon the premises, and take possession, and sell off the goods. There was a further proviso, that, until such default, it should be lawful for A. to keep possession of them. In 1823, A. had given a warrant of attorney to C. & D., as security for a debt of 1,100*l.*, and they, in November, 1828, entered up judgment, and sued out a fi. fa., under which the sheriff seized the goods. In trespass brought by B. against the sheriff, it was held, that, under these circumstances, the bill of sale was not fraudulent by reason of A.'s having continued in possession. The fact of possession not accompanying the transfer, is a fact to go to the jury, and no more. This being so, the transaction of the 23rd December, 1836, passed the legal property in the chronometer to the defendants: under that agreement, they became purchasers for a valuable consideration. The property having been once vested

1838.

REEVES v. CAPPER.

in them, the circumstance of the chronometer being placed in the hands of Wilson for the purposes of a voyage in the defendants' vessel, does not affect their right. They cannot be said to have ever parted with their possession; for, the possession of Messrs. Barraud, and the subsequent possession of Wilson, were in fact their possession. Wilson was by the very terms of the agreement to have the use of the chronometer for the voyage. Messrs. Barraud might have refused to redeliver it even to Wilson himself. *Ogle* v. *Atkinson*, 5 Taunt. 759. In *Reed* v. *Wilmott*, 5 M. & P. 553, 7 Bing. 577, it was held that a mortgage of chattels without delivery of possession to the mortgagee, is valid, if the mortgagor's continuing in possession is consistent with the terms of the deed.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:

The question which has arisen upon the motion for setting aside the verdict in this case appears to us to turn entirely upon the legal effect of the contract under which the chronometer was delivered by Wilson, the then owner, to Messrs. Capper, on the 23rd December, 1836. And it appears to us, upon the evidence, that Messrs. Capper, by the delivery of the chronometer to their clerk on that day, upon the terms of the special contract entered into between Wilson and them, acquired the legal property in the chronometer, to be held by them as a security for the repayment of 50*l.*; and that Wilson had nothing left in him but the reversionary property in the chronometer, to come into possession after such repayment had been made.

The chronometer was delivered to Messrs. Capper, and it was delivered for a valuable consideration: and this distinguishes the present case from those in which it has been held that a verbal gift of chattels, unaccompanied

1838.

REEVES v. CAPPER.

with delivery of possession, passes no property to the donee—*Reed* v. *Blades*, 5 Taunt. 212; *Irons* v. *Smallpiece*, 2 B. & Ald. 551. Further, the chronometer was delivered under a written agreement; and although such agreement not being under seal, that circumstance becomes immaterial as to the question of property, yet, being a written agreement, it proves with precision and accuracy the object of the delivery, and the nature of the interest intended to be passed:—"In consideration of your advancing me 100*l.* instead of 50*l.*, I hereby make over to you *as your property*, until that sum be repaid, my chronometer, &c., *you allowing me the use of the same for this voyage*." At the moment, therefore, of the delivery to Messrs. Cappers' clerk, the property vested in Messrs. Capper for the purpose and upon the condition mentioned in the written agreement, which condition has never been performed by repayment of the money.

Then arises the point upon which the plaintiff rests his claim to the chronometer under the subsequent pledge to him for a valuable consideration—viz. that the possession of the chronometer having been afterwards parted with by Messrs. Capper, and restored, as it is said, to Captain Wilson, the property of Messrs. Capper in it was entirely lost, either on the principle that the agreement with Messrs. Capper must be held fraudulent and void, as possession did not accompany it, or upon the ground, that, where the party to whom a personal chattel is pledged parts with the possession of it, he loses all right to his pledge. As to the first objection to the title of the defendants, the want of possession under the agreement can at the utmost amount to no more than a ground of fraud to be submitted to the jury; and no such question was made at the trial: and, indeed, the answer to the objection is sufficiently obvious, that the parting with the possession followed and was consistent with the very terms and provisions of the agreement itself. And, as to the second

1838.

GOULD v. OLIVER.

average by custom in respect of the loss of the timber by jettison. The damages were laid at 20*l*. The defendant in his first plea traversed the misconduct and unskilfulness charged in the first count, and in his second traversed the custom alleged in the second count; and he also pleaded a set-off of 22*l*. 19*s*. 9*d*., for general average payable by the plaintiffs in respect of other goods on board the vessel. The defendant demurred to the second plea (see 5 Scott, 445), and joined issue on the others.

In February, 1838, the plaintiffs obtained an order to amend their declaration (on payment of costs, and the defendant to be at liberty to plead de novo), by increasing the damages to 50*l*. The defendant thereupon withdrew his pleas, and pleaded payment into court of the sum of 22*l*. 19*s*. 9*d*. The plaintiffs having obtained a verdict, the Master, on the taxation of costs, allowed the defendant the costs of all the pleas as they stood at the time the judge's order was obtained in February.

Wilde, Serjeant, on a former day, obtained a rule calling upon the defendant to shew cause why the taxation should not be reviewed.—He submitted that the defendant was only entitled to the costs necessarily occasioned by the amendment.

R. V. Richards now shewed cause.—The defendant's amendment was a necessary consequence of the amendment of the plaintiffs' declaration. Had the declaration stood unaltered, the set-off would have been a sufficient answer: the damages being increased, it ceased to be an answer. The payment into court then became necessary, and, that being an admission of the cause of action pro tanto, the other pleas were rendered useless. The defendant was therefore entitled to the costs of those pleas.

Wilde, Serjeant, was stopped by the court.

1838.

Gentil v. Calvert.

TINDAL, C. J.—The withdrawal of the pleas was not a necessary consequence of the amendment of the declaration; they were merely withdrawn because the defendant did not think it prudent to retain them. The Master must reconsider the matter.

COLTMAN, J.—The pleas having been withdrawn, we must take it that they never should have been pleaded at all.

The rest of the court concurring—

Rule absolute.

Monday, Nov. 26th.

DAY *v.* CLARKE.

To entitle a defendant to costs under the 43 Geo. 3, c. 46, s. 3, on the ground of an excessive arrest, he must make out to the satisfaction of the court the absence of reasonable or probable cause: however great the disparity between the sum sworn to and that recovered, the statute does not cast the labouring oar upon the plaintiff.

ASSUMPSIT for work and labour as an architect and surveyor, for materials, and for money paid. The defendant was arrested for 347*l.*; the plaintiff claiming 300*l.* for his commission on the value of the work done, 31*l.* for the services of a clerk, and 16*l.* for cash paid for the defendant's use. The cause was referred. The two last-mentioned sums were not disputed; and 200*l.* had been paid into court; the arbitrator having directed a verdict to be entered for 211*l.* only—

B. Andrews, on a former day in this term, obtained a rule calling on the plaintiff to shew cause why the defendant should not have his costs under the 43 Geo. 3, c. 46, s. 3, he having been arrested without reasonable or probable cause for 347*l.* The affidavits upon which the motion was founded, stated, that, before the work was commenced, the plaintiff had assured the defendant the cost would not exceed 2,000*l.*; and it was sworn by surveyors and others that the value of the work done was from 2,500*l.* to 3,100*l.* The defendant, however, did not state the *actual* cost of the building.

1837.

DAY v. CLARKE.

Wilde, Serjeant, now shewed cause, upon affidavits, that, to the best of the knowledge and belief of the deponents, the cost of the building was 5,000*l.*; and that the defendant, though requested, had refused to produce his accounts.—To entitle him to the benefit of the statute, it is incumbent on the defendant to shew by affidavit an entire absence of reasonable and probable cause for the arrest.—*Fountain* v. *Young*, 1 Taunt. 60; *Graham* v. *Beaumont*, 3 Scott, 287, 5 Dowl. 49; *Clare* v. *Cooke*, 4 New Cases 269, 5 Scott, 698. In this court it has uniformly been held that the verdict is not conclusive as to the amount for which the plaintiff had reasonable cause (within the meaning of the statute) for holding the defendant to bail. In the Queen's Bench the decisions have fluctuated. Here, the affidavits on both sides disclose a case upon which the plaintiff might fairly anticipate the recovery of the full amount he claimed. [*Tindal*, C. J.—The defendant should have shewn what the actual cost of the building was. If a man has reasonable ground for fairly and honestly believing that he is not holding his debtor to bail for too large a sum, the case is not within the statute.]

B. Andrews and *Byles* in support of the rule.—The verdict of the jury is the criterion as to amount in cases of this sort.—*Ballantyne* v. *Taylor*, 5 Ad. & E. 792, 1 N. & P. 219: the notes of the judge who tried the cause may be referred to.—*Van Nieuwel* v. *Hunter*, 5 N. & M. 376, 3 Ad. & E. 243; and it is for the plaintiff to shew reasonable and probable cause.—*Summers* v. *Grosvenor*, 2 C. & M. 341; *Robinson* v. *Whitehead*, 6 Dowl. 292; *Griffiths* v. *Pointon*, 2 N. & M. 675. [*Tindal*, C. J.—Until you shew the contrary, I think we must assume that the plaintiff has acted fairly and honestly.] In *Twiss* v. *Osborne*, 4 Dowl. 107, Coleridge, J., says: "The court is not at liberty to go into the question whether the jury had or had not come

1838.

DAY v. CLARKE.

to a right conclusion in point of fact. It must now take the facts to be as the jury have found them. If they have come to an erroneous conclusion, the plaintiff should have taken steps to correct their finding." And in *Tipton* v. *Gardiner*, 5 N. & M. 424; 4 Ad. & E. 317, it was held that an application for costs under this statute, on the ground that the plaintiff arrested for 35*l.*, and recovered only 19*l.* 19*s.*, is not answered by affidavits stating that the plaintiff's demand was reduced at the trial by the false evidence of a witness who was in fact a partner of the defendant, but stated herself to be his servant only. Lord Denman there said: "It might have been made the ground of *a motion for a new trial*, that the evidence of Mrs. Inch was fraudulently palmed upon the jury as the evidence of an independant witness; but there seems to me to be nothing to take the case out of the general rule that *the amount of the verdict is prima facie proof of the want of reasonable and probable cause to arrest for the amount sworn to.*" And Patteson, J., says: "We cannot try the case over again upon affidavits."

TINDAL, C. J.—It does not appear to me that the present case is brought within the intention of the statute. The statute requires that it shall be made appear to the satisfaction of the court in which the action is brought, that the plaintiff had not any reasonable or probable cause for causing the defendant to be arrested and held to special bail in the amount sworn to. The evidence as to the value of the work was conflicting; and the defendant has furnished us with no means of ascertaining whether or not the amount sworn to on the part of the plaintiff was correct. Under the circumstances, I am not prepared to say that the plaintiff might not have really and honestly believed that 5,000*l.* at least was the value of the work. The defendant has not made out his case to my satisfaction.

1838.

DAY, I. v. CLARKE.

VAUGHAN, J.—I am of the same opinion. The simple question is, whether or not it is made to appear to our satisfaction that the arrest was without reasonable or probable cause. It may be conceded, that, where the disparity between the amount recovered and that for which the defendant has been arrested, is great, a fair presumption arises that the arrest is without reasonable or probable cause. But the legislature seem to have been careful and anxious that the judgment of the court should not be fettered by anything that passes at the trial; and therefore it is that the oath of the party is a material ingredient in the consideration of the case. The plaintiff here swears that he reasonably believed that he was entitled to recover the sum for which he held the defendant to bail; and he is corroborated by the opinions of other competent persons. The absence of information on the other side as to the actual cost of the building, affords a strong inference in the plaintiff's favour. The verdict certainly ought to have some influence; but the court is not to be bound by it.

BOSANQUET, J.—I am of the same opinion. In most of the cases where the verdict has been held to be evidence of the want of reasonable or probable cause, the plaintiff at the time of the arrest had no evidence to sustain his demand. In *White* v. *Prickett*, 4 New Cases, 5 Scott, 610, where the plaintiff failed in making out his right to recover a part of the sum for which he had held the defendant to bail, that part being barred by the statute of limitations; this court held that the defendant was not entitled to costs under the statute, it being sworn that he had several times within a short period *verbally* promised the plaintiff to pay the debt.

COLTMAN, J.—The verdict is certainly a material feature in the case; but still it does not relieve the defendant from the burthen of proving that he has been held to bail with-

1838.

DAY v. CLARKE.

out reasonable or probable cause. The defendant should have pledged his own conscience and belief as to the amount of the cost of the building.

Rule discharged.

Monday, Nov. 26th.

Where a demurrer, though not absolutely frivolous, is evidently for the mere purpose of gaining time, the court will permit it to be taken out of its turn.

DAWSON *v.* PARRY.

ASSUMPSIT by an indorsee against the acceptor of a bill of exchange. The declaration stated that the bill was drawn by one John Thomas for B. & Co., and by him indorsed to the plaintiff. To this declaration the defendant demurred specially, assigning for cause that there was no authority shewn for the *indorsement*. Park, J., on Saturday last, made an order setting aside the demurrer as frivolous.

Ball now moved that this order might be rescinded.—He cited *Turnor* v. *Standage*, 5 Scott, 556, where it was held, that, to induce the court to set aside a demurrer, it must be so manifestly frivolous as not to admit of argument; and submitted that this demurrer was clearly not frivolous.

Wilde, Serjeant, shewed cause in the first instance.—He submitted that the defendant, by accepting the bill as drawn, had sufficiently authenticated the drawer of it.

Ball, contra.—An authority to draw bills does not include an authority to indorse.

PER CURIAM.—The order may be set aside, the demurrer standing at the head of the paper for the first paper day next term.

Rule accordingly.

1838.

Monday, Nov. 26th.

BENN *v.* GREATWOOD.

Quære, whether a sci. fa. will lie upon an interlocutory judgment. The court refused to entertain the matter on motion.

ASSUMPSIT against the acceptor of a bill of exchange. Interlocutory judgment having been signed, but no proceedings having been taken thereon for more than a year (the debt having in the meantime been paid), the plaintiff sued out a scire facias in order to obtain his costs.

Henderson, on a former day in this term, obtained a rule nisi to set aside the sci. fa. for irregularity.—He submitted that a sci. fa. lies only after *final* judgment, and where there has been a change of parties by death or otherwise.

Wilde, Serjeant, now shewed cause.—The plaintiff's course is perfectly in accordance with the practice. There can be no objection to the writ pointing out the actual proceeding intended to be taken. The object of the statute was, to enable the plaintiff to continue the proceeding in any stage, without being compelled to begin a fresh action.—2 Selwyn's Practice, 189; 2 Crompton, 96—citing *How* v. *Acton*, 12 Mod. 500, where Holt, C. J., is reported to have said, that, "if plaintiff delay the executing a writ of inquiry till a year after the interlocutory judgment, he cannot do it afterwards without a scire facias."

Henderson, in support of his rule.—The statute of Westminster 2 (13 Edw. 1), stat. 1, c. 45, which gives the sci. fa. to the plaintiff in a personal action, provides—"That those things which are found inrolled before them that have the record, or contained in fines, whether they be contracts, covenants, obligations, services, or customs, recognizances, or other things whatsoever inrolled, to which the king's court may lawfully give effect, from

1838.

BANN v. GREATWOOD.

henceforth shall have such force that hereafter it shall not be necessary to implead upon them: but, when the plaintiff comes to the king's court, if the recognizance or fine levied be recent, that is to say, levied within the year, he shall forthwith have a writ of execution of the same recognizance. And if perchance the recognizance were made, or fine levied, of a longer time past, the sheriff shall be commanded that he make known to the party of whom the complaint is made, that he be before the justices at a certain day, to shew if he has anything to say why such matters inrolled, or contained in the fine, ought not to be executed: and if he do not come at the day, or come and can say nothing why execution ought not to be made, the sheriff shall be commanded to cause the thing inrolled, or contained in the fine, to be executed." The dictum in *How* v. *Acton* stands alone: and the rule as to a term's notice of executing a writ of inquiry shews that the course here adopted is irregular. A sci. fa. on an interlocutory judgment, is a thing unheard of. The argument was interrupted by—

TINDAL, C. J., who observed that this was much too grave a question to be determined on motion; and that, there being a dictum of Lord Hall in favour of the course pursued by the plaintiff, the defendant must be left to his remedy by writ of error.

The rule was ultimately, by consent, made absolute without costs.

Rule accordingly.

1838.

Monday, Nov. 26th.

PORAS *v.* WILKINS, a Prisoner.

A party taken in execution on the 27th November for a debt or damages not exceeding 20*l.*, is entitled to move for his discharge under the 48 Geo. 3, c. 123, s. 1, on the 26th November following, the ten days' notice required by rule 90 of Hilary Term, 2 Will. 4, having been previously given.

THE defendant was on the 27th November, 1837, taken in execution upon a ca. sa. issued out of this court, and had ever since remained in custody thereupon in the Fleet prison. The debt did not exceed 20*l.*, exclusive of costs.

Thomas, upon an affidavit of the above facts, and that the notice required by the rule of Hilary, 2 Will. 4 (28), had been served on the plaintiff, moved for the defendant's discharge under the 48 Geo. 3, c. 123, s. 1 (29). The question was whether or not the party had been in custody *twelve calendar months*.

PER CURIAM.—The custody is sufficient to entitle the defendant to the benefit of the act.

Rule absolute.

(28) R. 90, which provides that "A rule or order for the discharge of a debtor who has been detained in execution a year for a debt under 20*l.*, may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires."

(29) By which it is enacted "that all persons in execution upon any judgment, in whatsoever court the same may have been obtained, and whether such court be or be not a court of record, for any debt or damages not exceeding the sum of 20*l.*, exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged as thereinafter mentioned, shall and may, upon his, her, or their application for that purpose in term time made to some one of his majesty's superior courts of record at Westminster, to the satisfaction of such court, be forthwith discharged out of custody as to such execution, by the rule or order of such court: Provided always, that, in the case of any such application being made to be discharged out of execution upon a judgment obtained in any of his majesty's superior courts of record at Westminster, such application shall be made to such one of those courts only wherein such judgment shall have been obtained, and that whether the person so in execution shall

1838.

Monday, Nov. 26th.

The court set aside a warrant of attorney, on the ground that the defendant's execution was attested by an attorney introduced by the plaintiff's attorney.

RICE *v.* LINSTEAD.

WHITE, on a former day, obtained a rule nisi to set aside a warrant of attorney given by the defendant in this cause, on the ground that there was no sufficient attestation within the statute 1 & 2 Vict., c. 110, s. 9 (30). It appeared from the affidavits that the defendant executed the warrant of attorney in the presence of the plaintiff's son, who was a clerk in the office of Hopkins, his (the plaintiff's) attorney; that the execution was attested by one Foulk, who was introduced to the defendant by the plaintiff's son for the purpose, in the form required by the statute; and that the warrant of attorney was indorsed "Foulk for Hopkins."

R. V. Richards now shewed cause.—He submitted that the terms of the act were sufficiently complied with, and that there was nothing in the affidavit upon which the motion was founded, to lead to the conclusion that the defendant had been unfairly dealt with.

(30) Which, after reciting that "it is expedient that provision should be made for giving every person executing a warrant of attorney to confess judgment or a cognovit actionem due information of the nature and effect thereof"—enacts, "that no warrant of attorney to confess judgment in any personal action, or cognovit actionem, given by any person, shall be of any force, unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney."

Section 10 enacts "that a warrant of attorney to confess judgment or cognovit actionem not executed in manner aforesaid shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same."

1838.

RICE v. LINSTEAD.

White, in support of his rule.—The party by whom the attestation was made was not the attorney acting for the defendant, nor did he attend at her request: and therefore the statute has not been complied with.

TINDAL, C. J.—The intention of the legislature was most cautiously to guard parties from being over-reached in transactions of this sort. The statute enacts that no warrant of attorney or cognovit shall be of any force unless there shall be present some attorney attending on behalf of the party executing it, *expressly named by him, and attending at his request.* It appears to me that the person by whom this warrant of attorney was attested was not such an attorney of the defendant as the statute contemplates. The party's own free choice should be exercised in the matter. Not only did Foulk go with the plaintiff's son and at his request, but he seems to have been further mixed up with the affair after the execution of the warrant of attorney. He does not stand so wholly disinterested as he should do. The rule must be made absolute.

VAUGHAN, J.—The statute requires the attesting witness to be expressly named by, and attending at the request of the defendant. We must not fritter away the language of so wholesome a provision.

BOSANQUET, J.—*Hutson* v. *Hutson*, 7 T. R. 7, *Todd* v. *Gompertz*, 6 Dowl. 296, and *Walker* v. *Gardner*, 4 B. & Ad. 371, shew what the construction of this statute ought to be. In the last-mentioned case, a debtor, being arrested, offered a warrant of attorney. The plaintiff's attorney, who had also advised the defendant in previous stages of the business, came at his request to the place where he was in custody, and proposed another attorney whom he brought with him, to read over the warrant of

1838.

RICE v. LINSTEAD.

attorney to the defendant, and attest it on his behalf. The defendant acquiesced, but the attorney so introduced was not known to or sent for by him. It was held that this was not a compliance with the rule of Easter Term, 4 Geo. 2 (31), which "declares that no warrant of attorney executed by a person in custody of the sheriff, &c., shall be valid, unless there be present an attorney on his behalf to be expressly named by him, and attending at his request, to witness it; and the warrant of attorney and proceedings thereon were set aside for irregularity. In the present case, I think Foulk has been too much identified with the plaintiff to allow this attestation to be a good one.

Rule absolute, with costs.

(31) And see the rule of Hilary Term, 4 Will. 4, I. 72.

PETERS *v.* CROFT.

Monday, Nov. 26th.

Where a nolle prosequi is entered on a plea going to the whole cause of action, the defendant is entitled to judgment upon the whole record.

THIS was an action of debt for goods sold and delivered. The defendant pleaded—first, nunquam indebitatus—secondly, his discharge under the insolvent debtors act. The plaintiff delivered a similiter to the first plea, and a nolle prosequi to the second. The second plea going to the whole action, the defendant took to the office a judgment paper, marked "judgment of nol. pros.," in order to get his costs taxed.

Godson, on a former day, obtained a rule nisi to set aside the judgment, for irregularity.

Wilde, Serjeant, who shewed cause, relied upon *Cooper* v. *Tiffin*, 3 T. R. 511, and *Cooke* v. *Peter Sayer*, 2 Burr. 753, to shew, that, under the circumstances, the nolle prosequi being entered as to a plea going to the whole

1838.

PETERS v. CROFT.

cause of action, the defendant was entitled to judgment upon the whole record, and to the costs.

Godson, in support of his rule, submitted that the judgment was improperly entered upon the whole record.

PER CURIAM.—The second plea going to the whole cause of action, the judgment entered on a nolle prosequi as to that plea would be, nil capiat per billam. There is nothing therefore to shew that this judgment is irregular.

Rule discharged.

Monday, Nov. 26th.

Where an acknowledgment is taken abroad, the affidavit verifying the certificate need not name the place where it is taken.

Re SHUFFLEBOTTOM.

THE officer objecting to receive the affidavit verifying the certificate of acknowledgment under the 3 & 4 Will. 4, c. 74, because it omitted to state (as required by the form given in the rule of Hilary Term, 4 Will. 4) where the acknowledgment was taken—

Wilde, Serjeant, prayed that the court would direct the officer to receive it.—He submitted that the statute no where required the affidavit to state where the acknowledgment was taken, and that, if it did, it was sufficiently shewn, the affidavit appearing to have been sworn at Philadelphia: and he suggested that the rule was intended only to apply to England, where the commissioners are appointed to act for certain districts, and it would be material to shew that the acknowledgment was taken before the proper commissioners.

TINDAL, C. J.—There seems to be good sense in the distinction suggested. In this country, it is necessary that

it should be made to appear that the acknowledgement was taken before commissioners duly authorized to act in the place where it is taken. But the same reasons do not apply in the case of an acknowledgment taken abroad.

1838.
Re SHUFFLE-BOTTOM.

Rule accordingly.

END OF MICHAELMAS TERM.

As to Filing Affidavits in the case of Enlarged Rules.

Filing affidavits on enlarged rules.

On the evening of the last day of this term, a question having arisen as to the time for filing affidavits on enlarged rules, *Wilde*, Serjeant, stated the understanding upon which he had always acted, to be as follows:—Where a party comes to enlarge a rule against which he has to shew cause, he must file his affidavits a week before the first day of the ensuing Term: but, where he comes to enlarge his own rule, he cannot make the indulgence to himself a pretext for imposing a condition upon the other party.

INDEX.

ACCOUNTANT.

See MASTER AND SERVANT.

ACKNOWLEDGMENT.

I. *Under* 3 & 4 *Will.* 4, *c.* 74.

The court allowed the acknowledgment of a married woman taken at Hamburgh, to be filed under the 3 & 4 Will. 4, c. 74, ss. 84, 85, with an affidavit verifying the certificate of the due taking thereof, in the German language, sworn before the proper officer there, but not *signed* by the deponent—it being sworn that by the practice of the country the affidavit is never signed by the deponent. In re Birch and Bell, 185.

II. *Affidavit of Verification.*

Where an acknowledgment is taken abroad, the affidavit verifying the certificate need not name the place where it is taken. Re Shufflebottom, 898.

ACTION.

Joinder of Parties.

The plaintiffs declared upon the following agreement, signed by the defendant: —"Mr. J. E., and also Messrs. P. and M., as the executors of the will of the late Mr. J. M.: In consideration of your having paid me the sum of 32*l.* 6*s.* 6*d.*, in respect of the share of W. M., or of his assignees, in the produce of the estate called B. B., I undertake to indemnify and save you and each of you harmless from any claim that may be made against you in consequence of your having so paid me the said sum of money, whether by the said W. M., or any person claiming through him." J. E. was the attorney of P. and M., and as such had sold the estate, and held the proceeds at the time the above undertaking was given:—Held, that the agreement was properly sued upon by P. and M., without joining J. E. Place v. Delegal, 249.

ACTION ON THE CASE.

See CASE.

AFFIDAVITS.

I. *Intituling.*

Where a party sues or is sued in a representative character, affidavits made in the cause should be intituled accordingly. Engler v. Twysden, 581.

II. *To hold to Bail.*

1. The affidavit upon which to found an application for an order to arrest or detain a party under ss. 3 and 7, must be such as to shew to the satisfaction of the court or the judge that there is probable cause for believing that he is *about to quit* England unless he be *forthwith* apprehended; and must shew the grounds of such belief. Bateman v. Dunn, 739.

2. The swearing an affidavit to hold to bail (in trover) before a commissioner of the court, is a "business depending in the court," within the 11 Geo. 4 & 1 Will. 4, c. 70, s. 4, sufficient to authorize any judge of either court to make an order for holding the defendant to bail. Driffin v. Taylor, 141.

III. *Verifying Certificate of Acknowledgment under the* 3 & 4 *Will.* 4, *c.* 74—*see* ACKNOWLEDGMENT, II.

AGENT.

Duty of.

In assumpsit for the breach of an undertaking to effect an insurance according to special instructions, the declaration alleged the duty of the defendants to be to effect the insurance according to the instructions, or, in the event of their inability to do so, to give the plaintiff *notice* of such their inability:—Held, that this was a duty necessarily implied from the nature of the employment. Callander v. Oelrichs, 761.

AGREEMENT.

See ACTION—STAMPS, II.

AMENDMENT.

I. *Of Declaration, &c.*

The action having been improperly brought, under the 7 Geo. 4, c. 46, in the name of *two* persons as public officers, the 9th section only authorizing the action to be brought in the name of one—The court allowed the proceedings to be amended by striking out the name of one of the plaintiffs, on payment of costs. Holmes v. Binney, 346.

II. *Of Particulars of Demand.*

The court allowed the plaintiffs to amend their particulars, in an action for money had and received by the defendant whilst in their employ as clerk or agent at Mexico, by the insertion of fresh items arising within the period embraced by the former particulars, though ten years had elapsed—it appearing that the plaintiffs had been deluded by an account rendered by the defendant himself. Staples v. Holdsworth, 605.

III. *Of Fines.*

A fine was levied at the Autumn Great Sessions held for the county of Carmarthen in 1830 (the last Sessions held there under the Welsh judicature), and was duly proclaimed at those Sessions. At the Autumn Assizes for that county in 1831, proclamation was made of all fines levied at the Autumn Great Sessions for 1830; and it appeared that the fine in question was then upon that roll. The second proclamation alone was indorsed upon the foot or inrolment; the indorsement of the first and third having been omitted to be made by the officer whose duty it was to do so, viz. the deputy prothonotary (afterwards clerk of assize for the South Wales circuit):—The court allowed the proclamations to be indorsed by the clerk of the peace, into whose hands the records of fines for the county of Carmarthen, by the 11 Geo. 4 & 1 Will 4, c. 70, came on the death of the late deputy prothonotary—and this after an ejectment brought to recover the premises comprised in the fine. Lloyd, Dem., Nicholas, Def., 355.

2. A fine was levied at the Autumn Great Sessions held for the county of Cardigan in 1830 (the last Sessions held there under the Welsh judicature). The roll of fines levied at those Sessions was then proclaimed, and also at the Autumn Assizes for that county in 1831; and it appeared that the fine was then upon the roll of fines levied at the Autumn Great Sessions for 1830. There was no evidence as to any proclamation having been made at the Spring Assizes, 1831; and there was no indorsement of any of the proclamations—the officer whose duty it was to indorse them on the roll, having omitted to do so:—The court allowed the proclamations to be indorsed by the clerk of the peace, into whose hands the records of fines for the county of Cardigan, by the 11 Geo. 4 & 1 Will. 4, c. 70, came on the death of the late deputy prothonotary—and this after an ejectment brought to recover the premises comprised in the fine. Evans, Dem., Davies, Def., 372.

ANNUITY.

Liability of Surety after Discharge of the Grantor under the Insolvent Debtors Act.

1. By the 7 Geo. 4, c. 57, s. 51, it is enacted that the discharge of any prisoner under the act "shall and may extend to any sum and sums of money which shall be payable, by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever; and that every person and persons who would be a creditor or creditors of such prisoner for such sum or sums of money, if the same were presently due, shall be admissible as a creditor or creditors of such

prisoner for the value of such sum or sums of money so payable as aforesaid, which value the said court shall ascertain, &c. &c.; and such creditor or creditors shall be entitled in respect of such value to the benefit of all the provisions made for creditors by the act, without prejudice nevertheless to the respective securities of such creditor or creditors, excepting as respects such prisoner's discharge under the act:" —Held, that the discharge of the grantor of an annuity under the act, does not release one who had as surety for the grantor executed a joint and several warrant of attorney to secure the instalments of the annuity. Hocken v. Brown, 194.

2. And, semble, that the grantor is not discharged from liability to his surety for payments made by the latter in respect of the annuity subsequently to the grantor's discharge under the act. Ib.

ARBITRATION.

Entering Verdict.

To an action of assumpsit the defendant pleaded—non assumpsit—payment—and a set-off. The cause was referred to an arbitrator who was to have power to certify for whom, and for what amount, if any, the verdict should be entered. No evidence was offered before the arbitrator in support of the second and third pleas; but, the plaintiff failing to establish his claim, the arbitrator directed a general verdict to be entered for the defendant: —The court sent the matter back to the arbitrator, that the verdict might be entered according to the evidence. Woof v. Hooper, 281.

And see PAWNBROKER.

ARREST.

See PRISONER.

ASSURANCE.

See INSURANCE.

ATTACHMENT.

For Non-payment of Costs pursuant to a Rule.

1. An attachment for non-payment of money pursuant to a rule cannot properly issue upon an affidavit of a demand by the plaintiff's attorney, where the money is by the rule made payable *to the plaintiff* only, and there is no power of attorney. Mason v. Whitehouse, 246.

[See the next paragraph.]

2. A demand by the attorney of costs that are costs in the cause, will support an attachment for non-payment of them, though they are by the rule directed to be paid *to the party*, and there is no power of attorney. Mason v. Whitehouse, 576.

ATTORNIES.

I. *Admission.*

(1). *Preliminary Examination.*

A gentleman articled to an attorney quitted the service about the middle of the term, and went to the office of another attorney, to whom he was assigned. A fortnight having elapsed between the time of the clerk's quitting the former attorney and the execution of the assignment, though the service continued without interval—the Examiners declined to examine him:—The court intimated an opinion that the examination should be taken de bene esse. Ex parte Masterman, 782.

(2). *Fees payable thereon—see* REGULÆ GENERALES, I.

(3). *Sufficiency of Service—see* Ex parte Masterman, suprà.

II. *Duty of.*

A cause standing seventh in the paper (three of the preceding causes being marked "withdrawn," and the other three between the same parties,) was called on at eleven o'clock in the morning. The defendants' attorney had not instructed counsel; but one of the defendants (a sheriff's officer) was in court at the time, and made no objection to the cause proceeding. A verdict having been found for the plaintiff for 7*l.*, the court refused to grant a new trial, even on the terms of costs being paid by the defendants' attorney. Watson v. Reeve, 763.

III. *Bill of Costs.*

1. *Pending an action* brought by an attorney of this court for the recovery of a bill of charges for business done in the Central Criminal Court, it is competent to either of the superior courts to make an order for the taxation of such bill. Curling v. Sedger, 678.

2. And *semble* that this power is independent of the statute 2 Geo. 2, c. 23, s. 23. Ib.

3. The right of a party to have a signed bill delivered, and to have it referred for taxation, are correlative. Ib.

IV. *Delivering up Papers.*

A judge at Chambers having made an order requiring an attorney to deliver up to the husband (who had paid for it) the *draft* of a marriage settlement under which he (the attorney) was a trustee—The court refused to set aside the order. Ex parte Holdsworth, 170.

V. *Where a competent Witness.*

The partner of the attorney in the Mayor's court is a competent witness to prove the custom, and the course of proceeding in the particular cause. Magrath v. Hardy, 627.

AUCTION.

See VENDOR AND PURCHASER.

AUCTIONEER.

Relief under the Interpleader Act.

In an action against an auctioneer to recover back a deposit, the vendor claiming to be entitled to the money, the defendant obtained a rule under the interpleader act. The third party subsequently abandoning his claim:—Held, that the defendant, having acted bonâ fide, was entitled to his costs out of the fund—the plaintiff having a remedy over against the third party. Pitches v. Edney, 582.

AWARD.

See ARBITRATION.

BAIL.

I. *Affidavit to hold to Bail—see* AFFIDAVIT, II.

II. *Staying Proceedings on the Bail-bond.*

Where the defendant had been arrested and had given a bail-bond, the court (on the equity of the statute 1 & 2 Vict. c. 110) stayed proceedings on the bail-bond without an affidavit of merits. Norris v. Brighton, 752.

III. *Entering Exoneretur on Bail-piece.*

The court refused to enter an exoneretur on the bail-piece under the 1 & 2 Vict. c. 110, s. 7, where the defendant was resident in Scotland. Dalton v. Gibb, 751.

IV. *Payment into Court in lieu of—see* PAYMENT, II.

BANKRUPT.

What amounts to a Payment within the 6 Geo. 4, c. 16, s. 82.

1. One R., a trader, after a secret act of bankruptcy, and within two months before the issuing of a fiat against him, deposited goods with the defendant, in consideration of a present advance of money:—Held, that the assignees of R. might maintain trover for the goods, the transaction, though bonâ fide, and without notice of an act of bankruptcy, not being protected by the 6 Geo. 4, c. 16, s. 82. Wright v. Fearnley, 813.

2. *Semble*, that it would have been protected by s. 81, had the deposit been made more than two months before the issuing of the fiat. Coltman, J., dis. Ib.

[This case is now under consideration in the Exchequer Chamber.]

BARRISTER.

In an action by husband and wife for an assault on the latter, the venue was originally laid in Middlesex, but had been changed at the defendant's instance to Yorkshire. The court refused, upon a suggestion, that, since the commencement of the action, the husband had been called to the bar, to restore the venue to Middlesex. Newton v. Harland, 186.

BILLS OF EXCHANGE.

I. *Sufficiency of Stamp.*

To a count on a bill of exchange (against the acceptor), the defendant pleaded that the bill was not duly stamped or marked with any proper stamp or mark denoting that the lawful, requisite, and proper rate or duty chargeable or charged thereon had been or was duly stamped, marked, or impressed thereon:—Held, bad on special demurrer, inasmuch as it was left in doubt whether the bill was altogether unstamped, or stamped with a stamp of a higher or lower value than required by law. Haward v. Smith, 438.

II. *Notice of Dishonor to Drawer.*

In an action by indorsees against an indorser of a bill of exchange, the following letter was addressed by the plaintiffs to the defendant:—"Messrs. H. are surprised to hear that Mrs. G.'s bill was *returned to the holder unpaid.*" On the evening of the same day, the defendant called on the plaintiffs, expressed his surprise that the bill had not been paid, and promised to write to the *parties* in Edinburgh, and that he would see it paid, but made no objection to the sufficiency of the notice he had received. At the trial, it was left to the jury to say whether or not the letter and the conversation together amounted to a notice of dishonor. The jury having found for the plaintiffs, the court refused to disturb their verdict. Houlditch v. Cauty, 209.

III. *Staying Proceedings in Action against Acceptor.*

It is ordered, that, in future, in any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only. Reg. Gen. Trinity, 1 Vict., 351.

IV. *Production of, on Rule to Compute.*

The court will not entertain a preliminary motion to dispense with the production of a bill of exchange before the Master on a rule to compute. Landers v. Lee, 732.

BOND.

Assessment of Damages.

Debt on a bond conditioned for payment of money by instalments: the breaches were assigned in the replication, under the statute 8 & 9 Will. 3, c. 11:—Held, that the jury might assess the damages without a special venire. Scott v. Staley, 598.

BOSTON BOROUGH COURT.

See PAYMENT, II.

BRIBERY.

At Elections.

1. In debt on the statute 2 Geo. 2, c. 24, s. 7, for bribery at a borough election, the declaration charged the defendant with having bribed three individuals (naming them) by corruptly giving to each of them 10*l.* The evidence was, that the defendant received the voters in a room of a house in the borough, saying to each as he came in, "I hope you are with us; we give 10*l.*; if the other side give more, we will give more too," or words to that effect; that he then gave to each voter a card with his (the voter's) name written on it; that the voter was then shewn into an inner room, where sat a stranger, who, as each presented his card, placed on the table a small parcel containing 10*l.*, which the voter took, and retired:—Held, that this evidence sustained the declaration, and that it was properly left to the jury to say whether the two (the defendant and the man in the inner room) were not co-operating in the illegal act. Webb v. Smith, 147.

2. Held also, that evidence that the same ceremony was on the same day and at the same place gone through by the defendant and his co-adjutor with other persons not named in the declaration, was admissible. Ib.

3. And that the precept to the returning officer was sufficiently proved by an examined copy obtained from the Crown-office, whither it appeared to have been returned together with the writ and indenture. Ib.

4. And, *semble*, that it is the sheriff's duty so to return the precept. Ib.

CAPIAS.

See PRACTICE, I. 1, 2.

CASE.

I. *For Deceit.*

The declaration stated that one B. had agreed with the defendant for the purchase of the lease and goodwill of a public-house; that, before and at the time of making the agreement, the defendant falsely, fraudulently, and deceitfully represented to B. that the trade of the house was of a certain extent; that B. not being able to complete the purchase, it was afterwards agreed between the plaintiff, B., and the defendant, that the plaintiff should become the purchaser in the room of B., and at and before the making of the last-mentioned agreement B. communicated to the plaintiff the representation

the defendant had made to him; *of all which the defendant then had notice;* that the plaintiff, confiding in the representation so made by the defendant, agreed to become the purchaser, and paid the purchase-money; that the representation was false, as the defendant well knew; and that the plaintiff sustained damage. The defendant pleaded that he did not authorize B. to communicate to the plaintiff the representation he the defendant had made to B.:—Held, that the declaration disclosed a good cause of action; and that the plea was no answer to it. Pilmore v. Hood, 827.

II. *For Injury to the Plaintiff's Reversion.*

Land was held by A. and B. under two several demises from C.:—Held, that C. might maintain an action on the case against the owner of adjoining land, for digging coal under the land in the tenure of A. and B., to the injury of his reversion. Raine v. Alderson, 691.

CERTIFICATE.

See ACKNOWLEDGMENT, II.

CHARTERPARTY.

Construction of—See SHIP AND SHIPPING, I.

CHURCHWARDENS.

Using Waste Land under 1 & 2 *Will.* 4, *c.* 42, *s.* 2.

1. The plaintiffs, churchwardens and overseers, took possession of waste land in the parish, and used it in the manner directed by the 1 & 2 Will. 4, c. 42, s. 2:—Held, a sufficient possession to entitle them to maintain trespass against a mere wrong-doer. Matson v. Cook, 179.

2. Quære, as to the mode of proving the consent of the lord of the manor and of the copyholders, under the act. Ib.

COMMITTEE.

See DEED.

COMMON.

Pur Cause de Vicinage.

The defendant was the sole occupier of certain open and uninclosed downs in the county of Surrey; the defendant had a right of common upon the adjoining downs; the boundaries of the respective downs being ascertained only by posts placed at short distances in the ground:—Held, that, under the circumstances, common pur cause de vicinage could not be set up as an excuse for the trespassing of the plaintiff's cattle upon the downs so occupied by the defendant. Heath v. Elliott, 172.

CONSTABLES.

See WRIT OF REBELLION.

CONTEMPT.

See WRIT OF REBELLION.

COPYHOLDERS.

See CHURCHWARDENS, 2.

CORNWALL, DUCHY OF.

See COVENANT, I.

COSTS.

I. *Of Motions and Rules.*

1. Where a party comes to the court to cure a trifling irregularity, such as ought to be disposed of at Chambers, he will not be allowed costs, but they will be made costs in the cause. Roberts v. Lemon, 576.

2. Upon a motion for a review of taxation, the party, though successful, is not in general entitled to the costs of the rule. Parsons v. Pitcher, 298.

3. In an action against an auctioneer to recover back a deposit, the vendor claiming to be entitled to the money, the defendant obtained a rule under the interpleader act. The third party subsequently abandoning his claim:—Held, that the defendant, having acted bonâ fide, was entitled to his costs out of the fund—the plaintiff having a remedy over against the third party. Pitches v. Edney, 582.

II. *Under the* 43 *Geo.* 3, *c.* 46, *s.* 3.

1. The right of a defendant to costs under the 43 Geo. 3, c. 46, s. 3, cannot be in any way affected by what passes at the trial or before an arbitrator; but must depend upon matters brought before the court upon affidavit. Tarleton v. Dumelow, 687.

2. To entitle a defendant to costs under the 43 Geo. 3, c. 46, s. 3, on the ground of an excessive arrest, he must make out to the satisfaction of the court the absence of reasonable or probable cause; however great the disparity between the sum sworn to and that recovered, the statute does not cast the labouring oar upon the plaintiff. Day v. Clarke, 886.

III. *Taxation of Costs.*

1. The court will not prospectively direct in what manner costs shall be taxed. Roe v. Cobham, 146.

2. The directions to taxing officers, of Hilary Term, 4 Will. 4, apply as well to defendants' costs as to plaintiffs'. Parsons v. Pitcher, 299.

3. *Pending an action* brought by an attorney of this court for the recovery of a bill of charges for business done in the Central Criminal Court, it is competent to a judge of either of the superior courts to make an order for the taxation of such bill. Curling v. Sedger, 678.

4. And *semble* that this power is independent of the statute 2 Geo. 2, c. 23, s. 23. Ib.

5. The rights of a party to have a signed bill delivered, and to have it referred for taxation, are correlative. Ib.

6. The defendant having pleaded a set-off of a sum exceeding the damages laid in the declaration, the plaintiff obtained leave (on payment of costs) to amend his declaration by increasing the amount of damages. The defendant thereupon withdrew his plea of set-off, and pleaded payment into court:—Held, that the defendant was not entitled to the costs of the plea so withdrawn. Gould v. Oliver, 884.

IV. *Review of Taxation.*

1. Upon a motion for a review of taxation, the party, though successful, is not in general entitled to the costs of the rule. Parsons v. Pitcher, 298.

2. Where a defendant's costs had been taxed upon the higher scale, in an action in which the sum sought to be recovered was less than 20*l*., the Master's attention not having been called to the fact—The Court refused to order the taxation to be reviewed. Ib.

V. *Security for Costs.*

1. A notice that the defendant intends to move for security for costs by reason of the plaintiff's residence out of the jurisdiction of the court, does not dispense with the necessity of demanding security prior to the motion. Huntley v. Bulmer, 247.

2. Semble, that the affidavit upon which a motion for security for costs is founded should shew in what stage the proceedings are. Ib.

COVENANT.

I. *Express Covenants.*

1. Lands held under letters patent from the Duchy of Cornwall for a term determinable on the deaths of three parties named therein, were leased for 65½ years if the cestui que vies should so long live, with a covenant on the part of the lessor, his executors, &c., in case of the death of those parties during the term by the indenture granted, to "apply for, and do his and their utmost endeavours to procure a renewal or renewals of such letters patent for another life or lives, so as the lessees, their executors, &c., might hold and enjoy the premises for the whole term, subject only to the rents and covenants in the indenture mentioned, and without being compelled or compellable or liable to pay any part of the fine or fines that should be paid on such renewal." Two of the lives having dropped, the grantee of the letters patent applied for a renewal. The Duchy demanded for such renewal a fine which was found by a special verdict to have been a reasonable fine, if such fine ought to be calculated on the annual value of the premises taken at rack rent—two and a half and three years' value:—Held, that this was a proper mode of valuation, and the fine not unreasonable; and that the lessor, having declined to pay such fine, had failed to perform his covenant to do his utmost endeavours to procure a renewal of the letters patent. Simpson v. Clayton, 469.

2. Held also, that the above was a covenant running with the land. Ib.

3. And that the fact of the plaintiff being assignee only of a part of the interest created by the lease, did not preclude him from suing for and recovering damages in respect of the breach of covenant. Ib.

4. By articles of agreement between A.

and B., the former covenanted, that, in consideration of the rents thereinafter covenanted to be paid, he would, when a certain fence and drains should have been completed, and any of the messuages thereinafter covenanted to be built should have been built and covered in, &c., by indentures of lease, *demise and lease unto B. or his nominee all such messuages respectively as should be so built* upon certain ground particularly described, and specified in a plan annexed to the agreement; with a reservation to A. of a right of way over the streets—habendum to B. for eighty years, on payment of certain annual sums for the first six years, and for the remaining seventy-four the yearly *rent* of 400*l.*; and B. covenanted, amongst other things, to erect a wall of certain dimensions along the west side of the land: and it was further agreed, that, until the whole of the messuages should be completed, and the agreement in all things fulfilled, two of the houses should remain unleased: with power to A. to re-enter upon any undemised part of the premises, for non-performance of any of the before mentioned covenants. B. took possession under this agreement, and paid rent:—Held, that the legal interest in the soil passed to B. Alexander v. Bonnin, 611.

II. *Implied Covenants.*

Under the word "demise" is implied as well a covenant for title as a covenant for quiet enjoyment; but the whole is qualified and restrained by a subsequent *express* covenant for quiet enjoyment. Line v. Stephenson, 447.

[Affirmed on error in the Exchequer Chamber—see 7 Scott.]

III. *Under Power contained in a Will.*

J. S., tenant for life, under the will of his father, P. S., with a power of leasing for twenty-one years, in 1812 demised to T. C. for ninety-nine years, if he J. S. should so long live: in 1814, he, in the exercise of his power, granted a lease for twenty-one years to the defendant: in 1828, the surviving executor under the will of P. S., in exercise of a power to that effect in the will, granted a lease for one thousand years, for the purpose of raising money to pay debts and legacies:—Held, that the leasing power of J. S. under the will was not suspended by the lease of 1812, so far as regarded the grantee of the term under the power to demise by way of mortgage given to the executors; and consequently that such grantee had the immediate reversion in him, and might sue upon the covenants in the lease of 1814. Bringloe v. Goodson, 502.

IV. *Eviction.*

In a declaration alleging as a breach of a covenant for quiet enjoyment an eviction, it should not be left uncertain whether the party evicting did not claim under title derived from the plaintiff himself. Brookes v. Humphreys, 756.

And see LANDLORD AND TENANT.

CUSTOM.

I. *Proof of.*

1. By a charterparty made in London, the defendant engaged to ship on board the plaintiff's vessel at Bombay a full cargo at a certain price per ton—cotton to be calculated at fifty cubic feet per ton, and other goods according to the scale of tonnage of the East India Company. In an action of assumpsit for the freight:—Held, that it was competent to the defendant to give evidence of a custom at Bombay to calculate the freight upon a measurement of the bales of cotton immediately after they had been submitted to hydraulic or other pressure, so as to reduce them to the smallest practicable bulk. Bottomley v. Forbes, 866.

2. Held also, that it was competent to the plaintiff, in order to shew the unreasonableness of the alleged customs, to give evidence in reply that the cotton had increased in bulk 15 per cent. upon the screw measurement by the time it was put on board the vessel. Ib.

II. *In Respect of Husbandry Contracts.*

The declaration, in an action by a landlord against his tenant, charged the latter with a breach of duty in not cultivating land in a good and husbandlike manner *and* according to the custom of the country, in this, that he, (amongst other things) contrary to the custom of the country, carried away hay without returning a proportionate quantity of manure. The defendant, as to so much of the declaration as charged him with carry-

ing away the hay contrary to the custom of the country, pleaded that no such custom existed as that alleged :—Held, good on special demurrer. Hartley v. Burkitt, 497.

DAMAGES.

I. *Assessment of.*

Debt on a bond conditioned for payment of money by instalments: the breaches were assigned in the replication, under the statute 8 & 9 Will. 3, c. 11 :—Held, that the jury might assess the damages without a special venire. Scott v. Staley, 598.

II. *Evidence in Reduction of Damages.*

1. Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt; but shall be pleaded in bar. Reg. Gen., Trinity, 1 Vict., 354.

2. To a common count for work and labour as an accountant, the defendants pleaded non assumpsit, and payment. It appeared that 180*l.* had been received by the plaintiff on account of salary :—Held, that the defendants were entitled to shew, in reduction of damages, that the plaintiff's conduct had been fraudulent, and that the sum received by him covered the actual value of his services, although there was no plea of fraud. Baillie v. Kell, 379.

DEBT.

Replication de Injuriâ.

Quære, whether de injuriâ is a good replication in an action of debt. Hebden v. Ruel, 442.

DECEIT.

See CASE, I.

DEED.

Construction of.

I. Certain of the shareholders in an unsuccessful joint-stock Company, for their mutual protection and indemnity against the claims of the company's creditors, entered into an arrangement by deed, under which a committee of four was appointed, with power and authority (amongst other things) to settle all debts &c., and to wind up the affairs of the company. The parties executing this deed paid each 25*l.*, and also such calls upon their respective shares as remained unpaid (which was to form a primary fund for the payment of the debts, &c. due from the company), and covenanted to contribute and pay, in equal shares and proportions, all sums of money which might from time to time be required, in addition to the primary fund, for the payment or satisfaction of all or any of the debts, sums of money, bills of exchange, interest, bills of costs, salaries, costs, charges, and expenses due from the company, within ten days after demand, to a trustee named in the deed: and it was provided that the certificate for the time being of the committee, or the major part of them, of the sums and proportions required, should be *conclusive evidence* that the money was required, and of the proportion which each person was to pay. In pursuance of this deed, the committee certified that a sum of 5,100*l.* was required, in aid of and in addition to the primary fund, for the payment of debts &c., and that 150*l.* was the proportion payable by each of the parties to the deed. Some of the parties paid the 150*l.*, others did not. To meet the urgent demands upon them, their funds being exhausted, the committee themselves advanced large sums, and procured voluntary advances from other parties to the deed. 3,939*l.* 0*s.* 4*d.* remaining due of the debts and demands provided for by the deed, and advances having been made to various amounts by several of the parties to the deed, under the former certificate, and otherwise, amounting in the whole to 14,046*l.* 19*s.* 8*d.*, the committee, conceiving it to be the best mode of making an equitable adjustment, made a second certificate declaring that 17,986*l.* was required for payment of some of the debts &c. made payable by the deed, and that 529*l.* was the proportion payable by each of the parties. The letter accompanying this certificate and demand, contained a postscript informing those who had made advances under the former certificate or otherwise, that the sums so advanced by them would be set off against the sum then demanded.

In an action upon the deed, to recover the 529*l.* made payable by the last mentioned certificate, the declaration con-

tained an averment "that the major part of the members of the committee did, by writing under their hands, and in execution of the powers and authorities by the indenture vested in them, certify, *as the fact was*, that 17,986*l.* was then required for the payment of the debts &c., and that 529*l.* was the proportion which each of the parties was to pay." The defendant pleaded that the major part of the members of the committee did not certify, as the fact was, *nor was it the fact*, that 17,986*l.* was then required &c.:—Held, that the certificate was inconsistent with the facts proved; that the defendant was not estopped from contesting it, the truth of the certificate being put in issue by the plaintiff himself; and that the objection was equally available to those parties to the deed who had not contributed anything as to those that had. Wilson v. Wilson, 540.

2. But, held, that the above facts did not sustain a plea that the committee, "well knowing the premises, fraudulently and deceitfully signed the certificate, with intent to defraud the defendant and others." Ib.

3. The deed contained a proviso, that, in case any member of the committee should die, or decline or desire to be discharged from acting, or become incapable to act as a member of the committee, the others should have power to nominate another in his stead. One of the committee absconded to America under circumstances strongly evidencing an intention not to return:—Ruled by Tindal, C. J., that he thereby became incapable to act, within the meaning of the deed. Ib.

DEMURRER.

I. *Marking Points for Argument.*

Special demurrers are within the rule of Hilary Term, 4 Will. 4, s. 2, which requires the point to be marked in the margin: but, in such case, the rule will be complied with by a statement that the points intended to be argued are those stated in the demurrer itself. Verbecke v. Pearse, 406.

II. *Frivolous Demurrer.*

Where a demurrer, though not absolutely frivolous, is evidently for the mere purpose of gaining time, the court will permit it to be taken out of its turn. Dawson v. Parry, 890.

DEVISE.

Construction of.

1. The words "my estate," in a devise, are sufficient to pass a fee, unless accompanied by words of restraint. Doe d. Knott v. Lawton, 303.

2. The testator, possessed of the fee, after directing payment of his debts and funeral and testamentary expenses, and giving a legacy of 1*l.* to his eldest son, John, whom he appointed his executor, made a devise in the following words:—"I give and bequeath to my sons James and Joshua my *estate* that I now occupy, together with the factory and all the edifices and appurtenances thereon, except the house I now occupy, with the cottages occupied by C. and D., which I give to my daughters Martha and Alice jointly, share and share alike." He then devised to his daughter Martha a smithy, and to Alice a plot of land and building thereon occupied by certain persons named; and, after charging the "*estate* heretofore given to my sons" with certain payments particularly specified, in a subsequent part of the will he bequeathed to Joshua, "that *estate* or tenement lying and being at H., occupied by R. F., which I hold under lease from the Earl of Stamford, *during the term of my lease*."—Held, that, under the first devise, James and Joshua took a fee in all except the house and cottages; and that the daughters took a fee in those. Ib.

The testator devised and bequeathed to several sons and daughters realty and personalty as described in certain schedules annexed to his will, with survivorships and trusts of a very complicated description. A freehold house in Southwark of which the testator was seised at the time of making his will and at the time of his decease, he omitted specifically to dispose of; but by a codicil attested by one witness only he declared his intention to be that that house should go to his eldest son. The will contained the following residuary clause—"all the rest, residue, and remainder of my real and personal estate and effects whatsoever and wheresoever, I give, devise, and bequeath unto my said trustees, their heirs, &c., in trust to divide the same equally amongst my children when my youngest son shall attain the age of twenty-fi years, so and in such manner that t

shares of each of my children of and in the said residue may be held and enjoyed upon the same trusts, and be subject to the same contingencies and bequests over, as their respective original legacies are subject and liable to under and by virtue of this my will;"—Held, that the freehold in Southwark passed to the trustees under the residuary clause, notwithstanding the difficulty of dealing with it according to the trusts referred to. Barclay v. Collett, 408.

4. Testator devised lands in moieties to his two daughters Judith and Rachael for life, with remainders, and cross-remainders to the issue of Rachael, and, in default of such issue, to his three sisters for their lives and the life of the survivor; and, after the decease of his daughters, and of the issue of Rachael, and of his three sisters, to his nephews Moses and Napthali for life, and to the survivor of them; and, if Moses should (after the deaths of Judith and Rachael, the children of Rachael, and the testator's three sisters) die before Napthali, leaving issue male, the testator devised one moiety to the use of the first and every other son and sons of Moses severally and successively in tail male, and, in default of such issue, to Napthali for life, and, after his decease, to his first and other sons severally and successively in tail male, and, in default of such issue to testator's right heirs; and if Napthali should (after the deaths of Judith and Rachael, the children of Rachael, and the testator's three sisters) die before Moses, leaving issue male, the testator devised one moiety to the use of the first and every other son and sons of Napthali severally and successively in tail male, and, in default of such issue, to Moses for life, and, after his decease, to his first and other sons severally and successively in tail male, and, in default of such issue, to the testator's right heirs: and, in case Moses and Napthali should both die without leaving any issue male, or such issue male should die without leaving any issue male, to the use of such person or persons as should at the death of the survivor of them the said Moses and Napthali be the testator's right heir or heirs. The testator's daughter Rachael, his three sisters, and Moses, all died in the lifetime of Judith; Rachael and Moses never having had any issue:—Held, that Napthali, upon the death of Moses without issue, became seised of a vested estate tail in remainder (expectant on the determination of the estates limited to Judith and Rachael and the testator's three sisters) in the whole of the property. Franks v. Price, 710.

DISHONOR.

Notice of—See BILLS OF EXCHANGE, II.

DISCONTINUANCE.

To induce the court to permit a plaintiff who has incorrectly joined in the action one who was no party to the contract, to discontinue without paying costs, it must be clearly shewn that he was induced by the defendant's conduct to believe that the contract was entered into with the two, and that the mistake did not arise from his own negligence. Poensgen v. Chanter, 300.

DISTRINGAS.

To compel Appearance.

1. Motion for distringas to compel appearance—affidavit, what sufficient. Moody v. Morgan, 842.

2. Upon application for leave to issue a distringas to compel appearance, it must be made to appear that the defendant is not out of the kingdom. Norman v. Winter, 378.

DUCHY OF CORNWALL.

See COVENANT, I. 1, 2, 3.

DUPLICITY.

See PLEADING, I.

EASEMENT.

See LEASE, I.

EJECTMENT.

I. *Service of Declaration &c.*

1. Service of declaration and notice in ejectment upon the Southampton Railway Company. Doe d. Martyns v. Roe, 610.

2. Service upon the sexton who holds the keys of a dissenting chapel is sufficient to found a motion for judgment against the casual ejector. Doe d. Scott v. Roe, 732.

3. Service in ejectment for a chapel of ease. Doe d. Dickens v. Roe, 754.

II. *Judgment against Casual Ejector, Motion for, when made.*

In a country ejectment, the declaration was served before Easter Term, with a notice to the tenant to appear in that term:—Held, that a motion for judgment against the casual ejector might be made in Trinity Term. Doe d. Barth v. Roe, 433.

ENLARGED RULES.

Filing affidavits on enlarged rules, 900.

ESTATE TAIL.

See DEVISE, 3.

ESTOPPEL.

How taken advantage of.

In assumpsit for money had and received, the defendant pleaded a recovery against him of the debt sued for, by foreign attachment in the Lord Mayor's Court, London, in which attachment one Tyrie was the plaintiff, the present plaintiff defendant, and the present defendant garnishee; the plea setting out the custom as to foreign attachment, the material part of which was, that, after pledges found by the plaintiff in foreign attachment, *and execution had and executed* of the monies in the hands of the garnishee, the latter was discharged as against the defendant of the sum so attached and had in execution—that the custom was confirmed by act of parliament—and, after setting out all the proceedings in the Mayor's Court, concluded with an averment that T. thereby had execution of the said sum, and then and there acknowledged himself satisfied, as by the record more fully appeared. The plaintiff replied, that he never had notice of the proceedings in the plea mentioned, that T. had not execution of the said sum according to the custom, that the monies of the now plaintiff in the hands of the now defendant were never had in execution as by the plea supposed, that no execution founded upon the said supposed judgment in the plea mentioned was ever executed, and that the now defendant paid the money, if ever it was paid, without compulsion, and by connivance and collusion with T. The defendant thereupon joined issue:—Held, that the jury were not estopped by the record in the court below from finding according to the fact, the defendant having, by taking issue on the replication, waived any benefit he might otherwise have derived from the estoppel; for, that, where the estoppel appears upon the record (except in the special case of an estate in the land by estoppel), and the party who is entitled to take advantage of it, instead of relying upon it, goes to issue on the fact, he puts the matter at large, and the jury may disregard the estoppel. Magrath v. Hardy, 627.

EVICTION.

In a declaration alleging as a breach of a covenant for quiet enjoyment an eviction, it should not be left uncertain whether the party evicting did not claim under title derived from the plaintiff himself. Brookes v. Humphreys, 756.

EVIDENCE.

I. *Competency of Witness.*

The partner of the attorney in the Mayor's Court is a competent witness to prove the custom, and the course of proceeding in the particular cause. Magrath v. Hardy, 627.

II. *Admissibility of.*

1. In debt on the statute 2 Geo. 2, c. 24, s. 7, for bribery at a borough election, the declaration charged the defendant with having bribed three individuals (naming them) by corruptly giving to each of them 10*l*. The evidence was, that the defendant received the voters in a room of a house in the borough, saying to each as he came in, "I hope you are with us; we give 10*l*.; if the other side give more, we will give more too," or words to that effect; that he then gave to each voter a card with his (the voter's) name written on it; that the voter was then shewn into an inner room, where sat a stranger, who, as each presented his card, placed on the table a small parcel containing 10*l*, which the voter took, and retired:—Held, that this evidence sustained the declaration, and that it was properly left to the jury to say whether the two (the defendant and the man in the inner room) were not co-operating in the illegal act. Webb v. Smith, 147.

2. Held also, that evidence that the same ceremony was on the same day and at the same place gone through by the defendant and his co-adjutor with other persons not named in the declaration, was admissible. Ib.

3. And that the precept to the returning officer was sufficiently proved by an examined copy obtained from the Crown-office, whither it appeared to have been returned together with the writ and indenture. Ib.

4. In covenant for non-repair of premises demised, it is competent to the defendant to shew the general state and condition of the premises at the time of the demise, but not to go into matters of detail. Young v. Mantz, 277.

III. *What admissible under non assumpsit* —*See* PLEADING, IV.

IV. *Explanatory of Mercantile Contract.*

1. By a charterparty made in London, the defendant engaged to ship on board the plaintiff's vessel at Bombay a full cargo at a certain price per ton—cotton to be calculated at fifty cubic feet per ton, and other goods according to the scale of tonnage of the East India Company. In an action of assumpsit for the freight:—Held, that it was competent to the defendant to give evidence of a custom at Bombay to calculate the freight upon a measurement of the bales of cotton immediately after they had been submitted to hydraulic or other pressure, so as to reduce them to the smallest practicable bulk. Bottomley v. Forbes, 866.

2. Held also, that it was competent to the plaintiff, in order to shew the unreasonableness of the alleged custom, to give evidence in reply that the cotton had increased in bulk 15 per cent. upon the screw measurement by the time it was put on board the vessel. Ib.

V. *Private Documents.*

Upon an issue as to whether or not one J. M. was and had been from his attaining to competent age in the year 1779, down to and at the time of his making a will and codicil in the years, 1822 and 1825 respectively, a person of sane mind and memory, and capable of making a will; the defendant, in support of the affirmative, offered in evidence — a letter, dated Oct. 12, 1784, from the testator's cousin, with whom he appeared to have been in correspondence about that period —a letter from the vicar of Lancaster, requesting the testator to direct his attorney to do a certain act, which letter was found indorsed in the usual way of a business letter by the attorney — and a letter from the curate of the chapelry of Hornby, in Lancashire, of which the testator was the patron, containing general expressions of gratitude for favours conferred upon the writer. The writers of these letters were well known to the testator, and had been dead many years. The letters were offered for the purpose of shewing the opinions of the writers, and their treatment, of the testator:—Held, that they were not admissible in evidence. Wright v. Doe d. Tatham, 58.

VI. *Examination of Witness under the 1 Will. 4, c. 22.*

On a motion for the examination of a witness under the 1 Will. 4, c. 22, on the ground of a physical inability to attend, the affidavit of a medical man must be produced. Davies Dem., Lowndes, Ten., 738.

And see LEASE, III.

EXECUTORS AND ADMINISTRATORS.

Where a party sues or is sued in a representative character, affidavits made in the cause should be intituled accordingly. Engler v. Twysden, 581.

FEES.

On admission of Attornies—see REGULÆ GENERALES, I.

FINE.

On Renewals, how calculated.

Lands held under letters patent from the Duchy of Cornwall for a term determinable on the deaths of three parties named therein, were leased for 65½ years if the cestui que vies should so long live, with a covenant on the part of the lessor, his executors, &c., in case of the death of those parties during the term by the indenture granted, to "apply for, and do his and their utmost endeavours to procure a renewal or renewals of such letters patent for another life or lives, so as the lessees, their executors, &c., might hold and

enjoy the premises for the whole term, subject only to the rents and covenants in the indenture mentioned, and without being compelled or compellable or liable to pay any part of the fine or fines that should be paid on such renewal." Two of the lives having dropped, the grantee of the letters patent applied for a renewal. The Duchy demanded for such renewal a fine which was found by a special verdict to have been a reasonable fine, if such fine ought to be calculated on the annual value of the premises taken at rack-rent—two and a half and three years' value:—Held, that this was a proper mode of valuation, and the fine not unreasonable; and that the lessor, having declined to pay such fine, had failed to perform his covenant to do his utmost endeavours to procure a renewal of the letters patent. Simpson v. Clayton, 469.

Held also, that the fact of the plaintiff being assignee only of a part of the interest created by the lease, did not preclude him from suing for and recovering damages in respect of the breach of covenant. Ib.

FRAUD.

See DEED—SURETY.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

GENERAL RULES.

See REGULÆ GENERALES.

GRANT.

See RECOVERY.

GUARANTIE.

See SURETY.

HOLIDAYS.

Days of Easter.

The delivery of a demurrer is a "proceeding" within the meaning of the rule of Easter Term, 2 Will. 4, which provides that "the days between Thursday next before and the Wednesday next after Easter Day, shall not be reckoned or included in any rules or notices or other *proceedings*, except notices of trial and notices of inquiry, in any court of law at Westminster;" and that rule is still in force. Harrison v. Heathorn, 283.

INSOLVENT DEBTORS.

I. *Evidence of Insolvency.*

The defendant held premises under a lease containing a proviso for re-entry by the lessor in case the lessee should become bankrupt or insolvent, or his term or interest in the premises should be taken in execution for any debt. The defendant took the benefit of the insolvent debtors act in January, 1836. This forfeiture was waived by the acceptance of rent by the lessor down to Christmas, 1837. In ejectment for breach of the condition, the demise being laid on the 26th January, 1838. Held, that evidence that the debts enumerated in the defendant's schedule *remained unsatisfied*, and that the defendant had contracted a new debt, which he had been asked to pay, and had not paid—did not shew a continuing "insolvency," so as to constitute a breach of the condition. Doe d. Gatehouse v. Rees, 161.

II. *Fraudulent Securities.*

One D. proposed to make a composition with his creditors, paying them 8*s.* in the pound on their respective debts, they releasing him from all claims and demands in respect of such debts, and engaging to give up all securities held by them. Certain creditors of D. refused to sign the deed unless the defendants signed it: the defendants at first refused to do so, but afterwards consented, on D. assigning to them as a security for the residue of their debt a policy of assurance for 200*l.* on the life of his mother, which he had previously placed in their hands:—Held, that the assignees of D., against whom a fiat afterwards issued, might recover from the defendants in an action for money had and received, the money obtained by them from the insurance office on the falling of the life, the assignment of the policy being a fraud on the rest of the creditors—although the 8*s.* in the pound was not entirely paid. Alsager v. Spalding, 204.

III. *Notice to Creditors.*

A replication that the plaintiff had received no notice of the filing of the defendant's petition, though he was resident in England, and might have been served with such notice, is no answer to a plea of the defendant's discharge under the insolvent debtors act. Read v. Croft, 770.

IV. *Plea of Discharge under the Act.*

A defendant who is under terms to plead issuably, cannot plead that the plaintiff has been discharged under the insolvent debtors act, and that the cause of action has passed to his assignees. Wettenhall v. Graham, 603.

INSURANCE.

In assumpsit for the breach of an undertaking to effect an insurance according to special instructions, the declaration alleged the duty of the defendants to be to effect the insurance according to the instructions, or, in the event of their inability to do so, to give the plaintiff *notice* of such their inability:—Held, that this was a duty necessarily implied from the nature of the employment. Callander v. Oelrichs, 761.

INTERPLEADER.

I. *What a sufficient Notice of Claim.*

1. Quære, whether a notice from the solicitor that a fiat has issued against a party whose goods are in execution in the sheriff's hands, is a sufficient *claim* to entitle the sheriff to apply for relief under the interpleader act. Tarleton v. Dunelow, 843.

2. Quære, whether such an application should not, in vacation, since the 1 & 2 Vict., c. 45, s. 2, be made to a judge at chambers. Ib.

II. *Costs of Motions under the* 1 & 2 *Will.* 4, c. 58.

In an action against an auctioneer to recover back a deposit, the vendor claiming to be entitled to the money, the defendant obtained a rule under the interpleader act. The third party subsequently abandoning his claim:—Held, that the defendant, having acted bonâ fide, was entitled to his costs out of the fund—the plaintiff having a remedy over against the third party. Pitches v. Edney, 582.

IRREGULARITY.

See COSTS, I. 1.

ISSUABLE PLEA.

See PLEADING, V.

JOINT STOCK COMPANY.

See DEED.

JUDGMENT.

I. *Signing Judgment.*

1. At a quarter past eleven on the morning after the time for pleading had expired, the defendant's attorney called at the office of the plaintiff's attorney, in Buckingham Street, Strand, for the purpose of delivering a plea. Being informed that a clerk had just gone to the Temple to sign judgment, the defendant's attorney hastened thither, and arrived at the office just as the judgment had been signed:—Held, that the judgment was regular. Stafford v. Nicholls, 577.

2. A judgment signed on the morning after the time for pleading has expired, whilst the parties are attending a judge on a summons for time to plead returnable before the judgment is actually signed—is irregular. Abernethy v. Paton, 586.

II. *Entering and Docketting.*

A rule for entering and docketting the judgment must be addressed to the party, and not to the attorney. Engler v. Twysden, 580.

III. *As in Case of a Nonsuit.*

Issue was joined in Trinity Vacation, and an insufficient notice of trial given for the adjourned sittings after Trinity Term; the defendant refusing to accept the notice, a second notice was given for the first sitting in this term: the plaintiff not proceeding to trial pursuant to this notice, the defendant in the same term moved for judgment as in case of a nonsuit:—Held, too soon. Clarke v. Goldsmid, 894.

LANDLORD AND TENANT.

I. *Relative Rights and Duties.*

The declaration in an action by a landlord against his tenant, charged the latter with a breach of duty in not cultivating land in a good and husbandlike manner, and according to the custom of the country, in this, that he (amongst other things) contrary to the custom of the country, carried away hay without returning a proportionate quantity of manure. The defendant, as to so much of the declaration as charged him with carrying away the hay contrary to the custom of the country, pleaded that no such custom existed as

that alleged:—Held, good on special demurrer. Hartley v. Burkitt, 497.

II. *Covenant to Repair.*

In covenant for non-repair of premises demised, it is competent to the defendant to shew the general state and condition of the premises at the time of the demise, but not to go into matters of detail. Young v. Mantz, 277.

LEASE.

I. *What passes under "Appurtenances."*

1. In October, 1728, an ancestor of Lord Grosvenor made a lease for 97 years of certain ground to B. and A., which would expire at Lady-Day, 1824. In June 1799, the mother of the plaintiff became possessed of a portion of the ground (upon which a messuage had in the meantime been erected,) for 21 years; and in July, 1819, Lord Grosvenor, in whom the reversion in fee of the premises demised by the indenture of October, 1728, was then vested, demised the same *with the appurtenances*, to the plaintiff and his mother for 57½ years from Lady-Day, 1824. The lease of July, 1799, under which the plaintiff's mother was in possession at the time of the execution of the lease of July, 1819, would expire at Midsummer, 1820: under that lease the plaintiff's mother and those under whom she claimed had for more than thirty years enjoyed a right of way over a passage adjoining their premises on the east side, for the purpose of using a coal-shoot therein, and for the purpose of repairing the eastern wall of the house and certain pipes for the conveyance of water to and soil from the house; all which (according to the finding of the jury) were necessary for the convenient and beneficial use and occupation of the messuage. At the time this lease was granted the possession of the soil of the passage was in Lord Hampden by virtue of an indenture of assignment of March, 1793, to expire at Lady-day, 1824. In September, 1822, Lord Grosvenor granted to Lord Hampden a reversionary lease of the soil of the passage in question (amongst other premises), to commence at Lady-day, 1824, for 61 years. The defendant was assignee of that lease:—Held, that, at the time of the expiration of the original ground-lease at Lady-Day, 1824, there was no unity of possession in Lord Grosvenor both of the plaintiff's messuage and of the soil of the adjoining passage; but the several and distinct possession of the messuage in the state in which it had been before held, was continued in the lessees named in the lease of July, 1819. Hinchliffe v. The Earl of Kinnoul, 659.

2. Held also, that the right of passing and repassing over the soil of the passage, and using it for the purposes above mentioned, passed to the lessees under the lease of July, 1819, as a necessary incident to the subject-matter demised. Ib.

II. *Implied Covenants.*

Under the word "demise" is implied as well a covenant for title as a covenant for quiet enjoyment; but the whole is qualified and restrained by a subsequent *express* covenant for quiet enjoyment. Line v. Stephenson, 447.

[Affirmed on error in the Exchequer Chamber—see 7 Scott.]

III. *Proviso for re-entry in case of Insolvency.*

The defendant held premises under a lease containing a proviso for re-entry by the lessor in case the lessee should become bankrupt or insolvent, or his term or interest in the premises should be taken in execution for any debt. The defendant took the benefit of the insolvent debtors act in January, 1836. This forfeiture was waived by the acceptance of rent by the lessor down to Christmas, 1837. In ejectment for breach of the condition, the demise being laid on the 26th January, 1838:—Held, that evidence that the debts enumerated in the defendant's schedule *remained unsatisfied*, and that the defendant had contracted a new debt, which he had been asked to pay, and had not paid—did not shew a continuing "insolvency," so as to constitute a breach of the condition. Doe d. Gatehouse v. Rees, 161.

And see LANDLORD AND TENANT.

LEAVE AND LICENSE.

A plea of leave and license to *erect and maintain* a wall upon a given spot, is not supported by proof of a license to *erect* only. Alexander v. Bonnin, 611.

LETTERS.

See EVIDENCE, V.

LETTERS PATENT.

See COVENANT, I. 1.

LIBEL.

Partial Justification.

To an action for a libel asserting that the plaintiff's vessel (which was advertised to convey passengers and freight to India) was unseaworthy, and had been sold to the jews to take out convicts, the defendant put in a plea justifying the charge of unseaworthiness:—Held, bad on demurrer, inasmuch as it left unanswered a material part of the charge. Ingram v. Lawson, 775.

LICENSE.

See LEAVE AND LICENSE.

LIEN.

One W., the master of a vessel belonging to the defendants, on the eve of a voyage, in consideration of an advance of 50*l.*, by a memorandum dated the 23rd December, 1836, "made over to them as their property until the sum advanced should be repaid, his chronometer and all his nautical instruments then on board the vessel, they allowing him the use of the same for the voyage." The chronometer was at this time in the hands of the makers for safe custody and regulation; the transfer or charge was not communicated to them. W. used the chronometer for the voyage, and returned it to the makers as before, and afterwards pledged it to the plaintiff as security for a debt:—Held, upon an issue under the interpleader act to try the property in the chronometer, that it vested in the defendants under the agreement of the 23rd December, 1836, until the advance was repaid. Reeves v. Capper, 877.

And see PAWNBROKER.

LORD MAYOR'S COURT.

Practice of.

1. In assumpsit for money had and received, the defendant pleaded a recovery against him of the debt sued for, by foreign attachment in the Lord Mayor's Court, London, in which attachment one Tyrie was the plaintiff, the present plaintiff defendant, and the present defendant garnishee; the plea setting out the custom as to foreign attachment, the material part of which was, that, after pledges found by the plaintiff in foreign attachment, and *execution had and executed* of the monies in the hands of the garnishee, the latter was discharged as against the defendant of the sum so attached and had in execution—that the custom was confirmed by act of parliament—and, after setting out all the proceedings in the Mayor's Court, concluded with an averment that T. thereby had execution of the said sum, and then and there acknowledged himself satisfied, as by the record more fully appeared. The plaintiff replied, that he never had notice of the proceedings in the plea mentioned, that T. had not execution of the said sum according to the custom, that the monies of the now plaintiff in the hands of the now defendant were never had in execution as by the plea supposed, that no execution founded upon the said supposed judgment in the plea mentioned was ever executed, and that the now defendant paid the money, if ever it was paid, without compulsion and by connivance and collusion with T. The defendant thereupon joined issue. At the trial it was proved that no writ or precept of execution was issued or executed in the cause, or served upon the defendant in the foreign attachment, or on the garnishee, the now defendant:—Held, that the custom does not require that any notice of the proceedings in the Mayor's Court should be given to the defendant in the attachment; and that the allegation in the replication, that there was no execution had and executed pursuant to the custom, was a good answer to the plea, and, being proved, was a complete defence to the action. Magrath v. Hardy, 627.

2. The partner of the attorney for the garnishee in the Mayor's Court is a competent witness to prove the custom, and the course of proceeding in the particular cause. Ib.

LUNATIC.

See EVIDENCE, V.

MASTER AND SERVANT.

1. To a count in assumpsit for the

breach of an agreement to continue the plaintiff in the employ of the defendants (members of a company) as an accountant, the defendants pleaded, that the plaintiff received monies of the company for which he neglected to account—that he made wrongful and improper payments on account of the company—that he made false, fraudulent, and improper entries in the books and accounts, and rendered false, fraudulent, and fabricated accounts of pretended payments—that he made false, fraudulent, and fictitious representations of things done by him as accountant—that he refused to obey the commands of the defendants—that his accounts were so incorrectly, unskilfully, and improperly kept as to be utterly valueless to the defendants—and that he was unfit and incompetent to perform the duties of an accountant. The plaintiff replied de injuriâ. At the trial the defendants proved that the plaintiff had made false entries in the books and accounts of the company, and had concurred with certain of the directors in making false representations as to the state of the company's affairs; *wherefore the defendants discharged the plaintiff from their service*:—Held, that, the several allegations of misconduct in the plea being distinct and independent, the defendants, on proof of enough to justify their putting an end to the contract, were entitled to the verdict. Baillie v. Kell, 379.

2. Held also, that the fact of their having, at the time of dismissing the plaintiff, assigned a totally different reason for so doing, did not preclude the defendants from setting up the alleged acts of misconduct as a defence at the trial. Ib.

3. To a common count for work and labor as an accountant, the defendants pleaded non assumpsit, and payment. It appeared that 180*l.* had been received by the plaintiff on account of salary:—Held, that the defendants were entitled to shew, in reduction of damages, that the plaintiff's conduct had been fraudulent, and that the sum received by him covered the actual value of his services, although there was no plea of fraud. Ib.

MERITS.

See BAIL, II. 1.

MISREPRESENTATION.

See SURETY.

MONEY HAD AND RECEIVED.

See INSOLVENT DEBTORS, II.

MORTGAGE.

I. *Proof of Consideration.*

On the transfer of a mortgage for 10,000*l.*, with an additional advance of 4,000*l.*, it was proved that the 10,000*l.* were paid in bank-notes by the transferree to the original mortgagee by the direction and in the presence of the mortgagor, and the 4,000*l.* by a cheque to the mortgagor, as to which there was no proof that it was honored:—Held, that the payment of the 10,000*l.* was a sufficient consideration as against one claiming under a voluntary settlement. Doe d. Bartlett v. Francis Roe, 523.

II. *Stamp on Transfer.*

On the transfer of a mortgage, with an advance of an additional sum—Held, that an ad valorem stamp applicable to the additional advance is sufficient under the 3 Geo. 4, c. 117, s. 2, without any 1*l.* 15*s.* transfer stamp. Ib.

NEGLIGENCE.

See ATTORNEY, II.

NEW TRIAL.

See ATTORNEY, II.

NOLLE PROSEQUI.

Where a nolle prosequi is entered on a plea going to the whole cause of action, the defendant is entitled to judgment upon the whole record. Peters v. Croft, 897.

NONSUIT.

Judgment as in Case of—*See* PRACTICE, IX.

NOTICE.

I. *Of Action, under 5 & 6 Will. 4, c. 10.*

By a railway act, it was provided that no action should be brought against any *person* for any thing done or omitted to be done in pursuance of the act, or in the execution of its powers or authorities, unless twenty days' previous notice in writing should have been given by the party intending to commence and prosecute such action, to the intended *defendant*,

&c. :—Held, that *the company* were included in the word "person," and entitled to notice of action, notwithstanding that, in numerous instances throughout the act, the terms "person" and "party" were used in opposition to "corporation." Boyd v. The London and Croydon Railway Company, 461.

II. *Of Dishonor.—See* BILLS OF EXCHANGE, II.

OVERSEERS.

See CHURCHWARDENS.

PARTICULARS.

I. *Of Demand.*

1. The court allowed the plaintiffs to amend their particulars, in an action for money had and received by the defendant whilst in their employ as clerk or agent at Mexico, by the insertion of fresh items arising within the period embraced by the former particulars, though ten years had elapsed—it appearing that the plaintiffs had been deluded by an account rendered by the defendant himself. Staples v. Holdsworth, 605.

2. In any case in which the plaintiff (in order to avoid the expense of a plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money. Reg. Gen., Trinity, 1 Vict., 363.

3. But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums. Ib.

II. *Of Set-off.*

The court set aside a particular of set-off which the defendant was attempting to avail himself of in contravention of an express understanding between the parties as to the real question to be tried. Gould v. Oliver, 648.

III. *Of Payments pleaded.*

In an action for money had and received, the defendant pleaded, amongst other things, payment of 5,000*l.* in satisfaction of the plaintiff's demand:—The court compelled him to furnish particulars of the alleged payments. Ireland v. Thompson, 601.

IV. *Of objections to a Patent under the 5 & 6 Will. 4, c. 83, s. 5.—See* PATENT.

PATENT.

Particulars of Objections under 5 & 6 Will. 4, c. 83, s. 5.

Particulars of objections to a patent, under the 5 & 6 Will. 4, c. 83, s. 5, must be such as to convey to the plaintiff fair and reasonable information, and more definite than that conveyed by the defendant's pleas. Fisher v. Dewick, 587.

PAWNBROKER.

1. Where a pawnbroker is guilty of a violation of the statute 39 & 40 Geo. 3, c. 99, s. 6, by omitting to make the entries or to insert in the duplicates the result of the inquiries therein directed to be made, the contract of pledge is altogether avoided. Fergusson v. Norman, 794.

2. No lien is acquired by the pawnbroker under a contract so made. Ib.

PAYMENT.

I. *Protected Payments—See* BANKRUPT.

II. *Under Process of a Court.*

The defendants sued one Shepherd in the Boston Borough Court; the latter deposited with the sheriff the amount of the debt and 10*l.* for costs, under the 43 Geo. 3, c. 46, s. 2; the money was paid into court on the 13th September; on the 23rd, the plaintiffs in that action obtained the money under an order of the court, Shepherd having failed either to put in bail or to pay in an additional 10*l.* under the 7 & 8 Geo. 4, c. 71, s. 1; on the 28th a fiat issued against Shepherd, upon an act of bankruptcy committed on the 9th:—Held, that, notwithstanding the money was paid into court after the act of bankruptcy, the assignees of Shepherd could not recover it back; the creditors' right to it becoming complete on the debtor's failure to observe the conditions upon which he would have been entitled either to withdraw the money or to retain it in court to abide the event of the suit, and the payment having been made under the order of a court of competent jurisdiction. Reynolds v. Wedd, 699.

III. *Of Money into Court—See* REGULÆ GENERALES.

IV. *In Reduction of Damages.*

Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt; but shall be pleaded in bar. Reg. Gen., Trinity, 1 Vict., 354.

And see PARTICULARS OF DEMAND.

PEREMPTORY UNDERTAKING.

Default, where made.

Obtaining a rule for a special jury, after a peremptory undertaking, the cause being a proper one to be tried by a special jury, is not such a default as is contemplated by the statute 14 Geo. 2, c. 17. Twysden v. Stulz, 434.

PERSON.

See RAILWAY ACT.

PLEADING.

I. *Duplicity.*

1. In assumpsit by the drawer against the acceptor of a bill of exchange, the defendant pleaded, that the acceptance was obtained from him by duress, *and* that he never had any value for the acceptance:—Held, bad on special demurrer on the ground of duplicity. Stevens v. Underwood, 402.

2. A plea containing two distinct defences is not the less a double plea, because one of the defences is badly pleaded. Ib.

II. *Uncertainty.*

To a count on a bill of exchange (against the acceptor), the defendant pleaded that the bill was not duly stamped or marked with any proper stamp or mark denoting that the lawful, requisite, and proper rate or duty chargeable or charged thereon had been or was duly stamped, marked, or impressed thereon:—Held, bad on special demurrer, inasmuch as it was left in doubt whether the bill was altogether unstamped, or stamped with a stamp of a higher or lower value than required by law. Haward v. Smith, 438.

III. *General Issue, by Statute.*

It is ordered, that, in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of any act of parliament, he shall insert in the margin of such plea the words "By statute," otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament; and such memorandum shall be inserted in the margin of the issue and of the Nisi Prius record. Reg. Gen., Trinity, 1 Vict. 353.

IV. *What admissible in Evidence under non assumpsit.*

A trotting match was made between O. and T. for a 1,000*l.*, contrary to the statutes. The defendant took a 50*l.* share of O.'s risk, and agreed to let the plaintiff participate in it to the extent of 20*l.* O.'s horse won, and the defendant received the 50*l.* In an action brought by the plaintiff to recover the 20*l.* as money had and received to his use:—Held, that it was not competent to the defendant to set up the illegality of the transaction under non assumpsit. Martin v. Smith, 268.

V. *Issuable Pleas.*

A defendant who is under terms to plead issuably, cannot plead that the plaintiff has been discharged under the insolvent debtors act, and that the cause of action has passed to his assignees. Wettenhall v. Graham, 603.

VI. *Replication de Injuriâ.*

Quære, whether de injuriâ is a good replication in an action of debt. Hebden v. Ruel, 442.

VII. *Striking out Counts joined in Violation of the Rule of Hilary Term, 4 Will. 4, r. 5—See* PRACTICE, VI.

And see ESTOPPEL.

PLEDGE.

See PAWNBROKER.

PORTUGUESE BONDS.

Quære, whether Portuguese Bonds are "goods, wares, and merchandizes," within the meaning of the statute of frauds, 29 Car. 2, c. 3, s. 17. Pawle v. Gunn, 286.

POWER.

Of Leasing.

J. S., tenant for life, under the will of his father, P. S., with a power of leasing for twenty-one years, in 1812 demised to T. C. for ninety-nine years, if he J. S. should so long live:—in 1814, he, in the exercise of his power, granted a lease for twenty-one years to the defendant: in 1828, the

surviving executor under the will of P. S., in exercise of a power to that effect in the will, granted a lease for one thousand years, for the purpose of raising money to pay debts and legacies:—Held, that the leasing power of J. S. under the will was not suspended by the lease of 1812, so far as regarded the grantee of the term under the power to demise by way of mortgage given to the executors; and consequently that such grantee had the immediate reversion in him, and might sue upon the covenants in the lease of 1814. Bringloe v. Goodson, 502.

PRACTICE.

I. *Process.*

1. A writ of capias was issued against the defendant at the suit of C. D., an attorney, with an indorsement stating that the writ was issued by A. B. and C. D., of &c., attornies for the plaintiff:—Held, that this indorsement was a sufficient compliance with the statute 2 Will. 4, c. 39. Dawes v. Solomonson, 596.

2. A writ of capias and a rule to return it were delivered to the sheriff at the same time. The sheriff *two* days afterwards returned non est inventus:—The court refused to interfere. Evens v. James, 354.

3. Motion for distringas to compel appearance—affidavit, what sufficient. Moody v. Morgan, 842.

II. *Appearance.*

Upon application for leave to issue a distringas to compel appearance, it must be made to appear that the defendant is not out of the kingdom. Norman v. Winter, 378.

III. *Amendment of Proceedings.*

The action having been improperly brought under the 7 Geo. 4, c. 46, in the name of *two* persons as public officers, the 9th section only authorizing the action to be brought in the name of one—The court allowed the proceedings to be amended by striking out the name of one of the plaintiffs, on payment of costs. Holmes v. Binney, 316.

IV. *Discontinuance.*

To induce the court to permit a plaintiff who has incorrectly joined in the action one who was no party to the contract, to discontinue without paying costs, it must be clearly shewn that he was induced by the defendant's conduct to believe that the contract was entered into with the two, and that the mistake did not arise from his own negligence. Poensgen v. Chanter, 300.

V. *Staying Proceedings.*

It is ordered, that, in future, in any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only. Reg. Gen., Trinity, 1 Vict., 351.

VI. *Striking out Counts joined in Violation of the Rule of Hilary Term, 4 Will. 4, r. 5.*

In assumpsit against carriers for the non-delivery of goods, the declaration contained two counts—the first, on a contract for the conveyance of the goods from the port of loading to the port of discharge—the second, on a contract to take care of the same goods at the wharf where they should be landed, and to convey them to the plaintiff's place of business, for other reward to the defendants in that behalf:—The court refused to strike out one of the counts, upon a suggestion, that the joining them was an apparent violation of the rule of Hilary Term, 4 Will. 4, r. 5. James v. Bourne, 231.

VII. *Striking out Frivolous Demurrers.*

Where a demurrer, though not absolutely frivolous, is evidently for the mere purpose of gaining time, the court will permit it to be taken out of its turn. Dawson v. Parry, 890.

VIII. *Rule to compute.*

The court will not entertain a preliminary motion to dispense with the production of a bill of exchange before the Master on a rule to compute. Landers v. Lee, 732.

IX. *Judgment as in Case of a Nonsuit.*

1. Issue was joined in Trinity Vacation, and an insufficient notice of trial given for the adjourned sittings after Trinity Term; the defendant refusing to accept the notice, a second notice was given for the first sitting in this term, the plaintiff not proceeding to trial pursuant to this notice, the defendant in the same term moved for judgment as in case

of a nonsuit:—Held, too soon. Clarke v. Goldsmid, 894.

2. Issue was joined in Easter Term, and notice of trial given for the second sitting in Trinity Term:—Held, that the defendant was not entitled to move for judgment as in case of a nonsuit until Michaelmas Term. Phillipps v. Yeardley, 602.

X. *Marking Points for Argument.*

Special demurrers are within the rule of Hilary Term, 4 Will. 4, s. 2, which requires the point to be marked in the margin: but, in such case the rule will be complied with by a statement that the points intended to be argued are those stated in the demurrer itself. Verbecke v. Pearse, 406.

XI. *View.*

In an action on a contract for building a chapel, the court refused to grant the plaintiff a rule for a view. Newham v. Taite, 574.

XII. *Nolle prosequi.*

Where a nolle prosequi is entered on a plea going to the whole cause of action, the defendant is entitled to judgment upon the whole record. Peters v. Croft, 897.

XIII. *Entering Verdict.*

To an action of assumpsit the defendant pleaded—non assumpsit—payment—and a set-off. The cause was referred to an arbitrator who was to have power to certify for whom and for what amount, if any, the verdict should be entered. No evidence was offered before the arbitrator in support of the second and third pleas; but, the plaintiff failing to establish his claim, the arbitrator directed a general verdict to be entered for the defendant:—The court sent the matter back to the arbitrator, that the verdict might be entered according to the evidence. Woof v. Hooper, 281.

XIV. *Signing Judgment.*

1. At a quarter past eleven on the morning after the time for pleading had expired, the defendant's attorney called at the office of the plaintiff's attorney, in Buckingham Street, Strand, for the purpose of delivering a plea. Being informed that a clerk had just gone to the Temple to sign judgment, the defendant's attorney hastened thither, and arrived at the office just as the judgment had been signed:—Held, that the judgment was regular. Stafford v. Nicholls, 577.

2. A judgment signed on the morning after the time for pleading has expired, whilst the parties are attending a judge on a summons for time to plead returnable before the judgment is actually signed—is irregular. Abernethy v. Paton, 586.

XV. *Entering and docketting Judgment.*

A rule for entering and docketting the judgment must be addressed to the party, and not to the attorney. Engler v. Twysden, 580.

XVI. *Entering Satisfaction on the Roll.*

Where the plaintiff's attorney had charged in his bill, and had been paid, for entering satisfaction on the roll, but had omitted to do so.—The court, at the instance of the defendant, ordered him to do so at his own cost. Oram v. Parker, 245.

XVII. *Business at Chambers.*

The swearing an affidavit to hold to bail (in trover) before a commissioner of the court, is a "business depending in the court," within the 11 Geo. 4 & 1 Will. 4, c. 70, s. 4, sufficient to authorise any judge of either court to make an order for holding the defendant to bail. Driffin v. Taylor, 141.

And see INTERPLEADER—VENUE.

PRINCIPAL AND AGENT.

Duty of Agent.

In assumpsit for the breach of an undertaking to effect an insurance according to special instructions, the declaration alleged the duty of the defendants to be to effect the insurance according to the instructions, or, in the event of their inability to do so, to give the plaintiff *notice* of such their inability:—Held, that this was a duty necessarily implied from the nature of the employment. Callander v. Oelrichs, 761.

PRISONER.

I. *Discharge under* 48 *Geo.* 3, *c.* 123, *s.* 1.

A party taken in execution on the 27th November for a debt or damages not ex-

ceeding 20*l.*, is entitled to move for his discharge under the 48 Geo. 3, c. 123, s. 1, on the 26th November following, the ten days' notice required by rule 90 of Hilary Term, 2 Will. 4, having been previously given. Poras v. Wilkins, 893.

Discharge of, under 1 & 2 Vict. c. 110.

1. Upon the equity of the 1 & 2 Vict. c. 110, s. 7, a defendant who was arrested and had given bail before that statute came into operation, was held entitled to have an exoneretur entered upon the bail-piece on entering a common appearance. Bateman v. Dunn, 739.

2. The affidavit upon which to found an application for an order to arrest or detain a party under ss. 3 and 7, must be such as to shew to the satisfaction of the court or the judge that there is probable cause for believing that he is *about to quit* England unless he be *forthwith* apprehended; and must shew the grounds of such belief. Ib.

And see BAIL.

PROMISSORY NOTES.

It is ordered, that, in future, in any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only. Reg. Gen., Trinity, 1 Vict., 351.

QUIET ENJOYMENT.

See COVENANT, II.

RAILWAY ACT.

Construction of.

1. By a railway act, it was provided that no action should be brought against any *person* for any thing done or omitted to be done in pursuance of the act, or in the execution of its powers or authorities, unless twenty days' previous notice in writing should have been given by the party intending to commence and prosecute such action, to the intended *defendant*, &c.:—Held, that *the company* were included in the word "person," and entitled to notice of action, notwithstanding that, in numerous instances throughout the act, the terms "person" and "party" were used in opposition to "corporation." Boyd v. The London and Croydon Railway Co., 461.

2. Service of declaration and notice in ejectment upon the Southampton Railway Co. Doe d. Martyns v. Roe, 610.

REBELLION, WRIT OF.

See WRIT OF REBELLION.

RECOVERY.

Operation of, on Reversion in the Crown.

By letters patent, King Charles the Second, in the twenty-fifth year of his reign, in consideration of natural love and affection, granted an estate tail in certain lands to his illegitimate son, H. F., afterwards created Duke of Grafton:—Held, that such estate, and all other estates tail and remainders and reversions thereupon expectant or depending, were effectually barred and extinguished by indentures of bargain and sale under the 3 & 4 Will. 4, c. 74, s. 15, notwithstanding the statute 34 & 35 Hen. 8, c. 20. Duke of Grafton v. The London and Birmingham Railway Co., 719.

REGULÆ GENERALES.

I. *Fees payable on Admission of Attornies, and Distribution thereof.*

Whereas it is provided by the act of 1 & 2 Vict. c. 45, s. 3, that, after the 1st November, 1838, any person entitled to be admitted an attorney of any of the superior courts of common law at Westminster, shall, after being sworn in and admitted as an attorney of any one of the said courts, be entitled to practise in any other of the said courts, upon signing the roll of such court, and not otherwise, in like manner as if he had been sworn in and admitted an attorney of such court; provided that no additional fee besides those payable under an act of 1 Vict., c. 56, shall be demanded or paid; and that the fees payable for such admissions shall be apportioned in such manner as the judges of the said courts, or any eight of them, shall by any rule or order made in term or vacation direct and appoint:

We therefore direct and appoint that the fees payable by virtue of the said last-mentioned act for the judge's fiat, be received in the first instance by the clerk of the judge granting the fiat, and paid

over by him to the clerk of the Chief Justice or Chief Baron of the court, as the case may be; and, the day after each term, all the fees so received shall be divided into fifteen portions, one of which shall be paid to the clerk or clerks of each judge; and, further, that the fees payable by virtue of the said act to the ushers, shall be received, in the first instance, by one of the ushers of the court in which the admission shall take place, and shall, on the day after each term, be divided into three equal portions, one of which shall be paid to the ushers of each court. Reg. Gen., Michaelmas, 2 Vict., 709.

II. *Payment of Money into Court.*

Whereas it is expedient that certain of the rules and regulations made in Hilary Term, 4 Will. 4, pursuant to the statute 3 & 4 Will. 4, c. 42, s. 1, should be amended, and some further rules and regulations made pursuant to the said statute:

It is therefore ordered, that, from and after the first day of Michaelmas Term next, inclusive, unless parliament shall in the meantime otherwise enact, the following rules and regulations, made pursuant to the said statute, shall be in force:

It is ordered that the 17th and 19th of the General Rules and Regulations made pursuant to the statute 3 & 4 Will. 4, c. 42, s. 1, be repealed; and that, in the place thereof, the two following amended rules be substituted:—

For the 17th Rule]—When money is paid into court, such payment shall be pleaded in all cases, and as near as may be in the following form, mutatis mutandis:—

"C. D. ats. A. B." "The —— day of ——. "The defendant, by ——, his attorney, [*or*, in person, &c.] says, [*or, in case it be pleaded as to part only, add*, 'as to ——*l.*, being part of the sum in the declaration (*or*, —— count) mentioned,' *or* 'as to the residue of the sum of ——*l.*"] that the plaintiff ought not further to maintain his action, because the defendant now brings into court the sum of ——*l.* ready to be paid to the plaintiff: And the defendant further says that the plaintiff has not sustained damages [*or, in actions of debt*, 'that he never was indebted to the plaintiff'] to a greater amount than the said sum of &c., in respect of the cause of action in the declaration [*or*, 'in the introductory part of this plea'] mentioned: And this he is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his action thereof."

For the 19th Rule]—The plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty in that case to tax his costs of suit, and, in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed; or the plaintiff may reply "that he has sustained damages [*or*, "that the defendant was and is indebted to him," *as the case may be*,] to a greater amount than the said sum;" and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit. Trinity, 1 Vict., 351—3.

III. *Pleading—General Issue by Statute.*

It is further ordered, that, in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of any act of parliament, he shall insert in the margin of such plea the words "By statute," otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament; and such memorandum shall be inserted in the margin of the issue and of the Nisi Prius record. Trinity, 1 Vict., 353.

IV. *Particulars of Demand.*

In any case in which the plaintiff (in order to avoid the expense of a plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money.

But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums. Trinity, 1 Vict., 353.

V. *Payment to be pleaded.*

Payment shall not in any case be

allowed to be given in evidence in reduction of damages or debt; but shall be pleaded in bar. Trinity, 1 Vict., 354.

RELEASE.

The defendant pleaded in bar a deed of release alleged to have been executed by the plaintiffs and other creditors of one Crokat, a prior indorser. The deed appeared to have been executed by the plaintiffs alone, and was in form a mere assignment by the plaintiffs to one Souter, of the debt due to them from Crokat, putting Souter in their place with regard to the remedy against Crokat on the bill; the consideration for such assignment being 2s. 6d. in the pound on the amount of the debt:—Held, that this deed did not sustain the plea. Houlditch v. Cauty, 209.

REVERSION.

See COVENANT, III.

ROLL.

Entering Satisfaction on—*See* PRACTICE, XVI.

SALE.

See AUCTIONEER—VENDOR AND PURCHASER.

SECURITY FOR COSTS.

See COSTS, V.

SET-OFF.

See COSTS, III. 6.

SETTLEMENT.

See VOLUNTARY SETTLEMENT.

SCIRE FACIAS.

Quære, whether a sci. fa. will lie upon an interlocutory judgment. The court refused to entertain the matter on motion. Benn v. Greatwood, 891.

SHERIFF.

Duty of.

1. A writ of capias and a rule to return it were delivered to the sheriff at the same time. The sheriff *two* days afterwards returned non est inventus:—The court refused to interfere. Evens v. James, 354.

2. *Semble*, that it is the sheriff's duty to return into the Crown-office the precept for the election of a member to serve in parliament, together with the indenture. Webb v. Smith, 147.

SHIP AND SHIPPING.

I. *Construction of Charterparty.*

A vessel lying at Pembroke was chartered on a voyage from Cardiff to Alexandria with a cargo of coals and iron, to be shipped at Cardiff; forty running days to be allowed the merchant for loading at Cardiff and unloading at Alexandria—to commence on the 16th December. At the request of the plaintiffs, the defendant consented to the coals being put on board at Pembroke instead of at Cardiff:—Held, that the days thus consumed at Pembroke after the 16th December, were to be reckoned as part of the forty lay days. Jackson v. Galloway, 786.

II. *Admissibility of Evidence to explain the Meaning of a Charterparty.*

1. By a charterparty made in London, the defendant engaged to ship on board the plaintiff's vessel at Bombay a full cargo at a certain price per ton—cotton to be calculated at fifty cubic feet per ton, and other goods according to the scale of tonnage of the East India Company. In an action of assumpsit for the freight:—Held, that it was competent to the defendant to give evidence of a custom at Bombay to calculate the freight upon a measurement of the bales of cotton immediately after they had been submitted to hydraulic or other pressure, so as to reduce them to the smallest practicable bulk. Bottomley v. Forbes, 866.

2. Held also, that it was competent to the plaintiff, in order to shew the unreasonableness of the alleged custom, to give evidence in reply that the cotton had increased in bulk 15 per cent. upon the screw measurement by the time it was put on board the vessel. Ib.

SPANISH BONDS.

Quære, whether Spanish Bonds are "goods, wares, and merchandizes," within the meaning of the statute of frauds, 29 Car. 2, c. 3, s. 17. Pawle v. Gunn, 287.

SPECIAL CASE.

Right to begin, where affirmative on the defendant? Franks v. Price, 714.

SPECIAL JURY.

Obtaining a rule for a special jury, after a peremptory undertaking, the cause being a proper one to be tried by a special jury, is not such a default as is contemplated by the statute 14 Geo. 2, c. 17. Twysden v. Stulz, 434.

STAMP.

I. *On Bill of Exchange.*

To a count on a bill of exchange (against the acceptor), the defendant pleaded that the bill was not duly stamped or marked with any proper stamp or mark denoting that the lawful, requisite, and proper rate or duty chargeable or charged thereon had been or was duly stamped, marked, or impressed thereon:—Held, bad on special demurrer, inasmuch as it was left in doubt whether the bill was altogether unstamped, or stamped with a stamp of a higher or lower value than required by law. Haward v. Smith, 438.

II. *On Agreement.*

"I have received the sum of 20*l.*, which I have borrowed of you, and I have to be accountable for the said sum, with legal interest:"—Held, that this was not a promissory note, but an agreement, and therefore admissible in evidence under a common agreement stamp. Horne v. Redfearn, 260.

III. *On Lease.*

The defendant became the purchaser at an auction of a lot described as "the herbage of Upper Townshend's Close, Lower Townshend's Close, and the Priory," at the price of 45*l.*; by the conditions of sale it was agreed that a deposit of ten per cent. should be paid, and a bill given for the residue, and that the purchaser should be entitled to *possession* of the lot until the 29th September. The contract of purchase at the foot of the conditions, signed by the defendant, was stamped with a 1*l.* stamp:—Held, that this was a lease of hereditaments granted in consideration of a sum of money by way of premium under 50*l.*, without any yearly rent; and therefore properly stamped with a 1*l.* stamp. Cattell v. Gamble, 733.

IV. *On Transfer of Mortgage.*

On the transfer of a mortgage, with an advance of an additional sum:—Held, that an ad valorem stamp applicable to the additional advance is sufficient under the 3 Geo. 4, c. 117, s. 2, without any 1*l.* 15*s.* transfer stamp. Doe d. Barnes v. Francis Roe, 525.

STATUTE OF FRAUDS.

Quære, whether Spanish and Portuguese Bonds are "goods, wares, and merchandizes," within the meaning of the statute of frauds, 29 Car. 2, c. 3, s. 17. Pawle v. Gunn, 286.

STAYING PROCEEDINGS.

See PRACTICE, V.

STOCK BROKER.

Time Bargains.

The plaintiff, a stock-broker, at the defendant's request, made time bargains for him in foreign stocks, and in the result was compelled, according to the usage of the Stock Exchange, to pay the differences. Before the settling day, the defendant sent to the plaintiff to inform him that he was unable to meet his engagements, and therefore was compelled to absent himself; and at a subsequent time he promised to pay the amount. The jury having found a verdict for the plaintiff, the court refused to disturb it—holding, that the evidence warranted an inference that the payment was made at the defendant's request. Pawle v. Gunn, 286.

SURETY.

1. If any material part of the transaction between a creditor and his debtor is, with the knowledge or assent of the creditor, misrepresented to a surety, the misrepresentation being such, that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the security so given is void at law, on the ground of fraud. Stone v. Compton, 846.

2. The plaintiffs agreed to lend 2,600*l.*

to C. & D. upon the security of a policy of insurance, a mortgage of certain leaseholds, and the joint and several promissory note of the defendant and one E. for 2,600*l.*, the plaintiffs deducting thereout a debt of 600*l.* then due to them from C. on his private account. A deed prepared in conformity with this agreement recited, amongst other things, that the entire interest in the policy was available for the purposes of the security, and *that the private debt of C. had been paid to the plaintiffs.* The nature of the agreement between the plaintiffs and C. & D. was not communicated to the defendant, but the recitals of the deed were read over in his presence when he attended at the office of the plaintiff's attornies for the purpose of signing the note, and the note bore an indorsement identifying the sum thereby secured with the sum mentioned in the deed;—Held, that this untrue representation thus made to the defendant before he signed the note, that the private debt of C. had been paid, avoided the note. Ib.

TRESPASS.

See CHURCHWARDENS.

TROVER.

One W., the master of a vessel belonging to the defendants, on the eve of a voyage, in consideration of an advance of 50*l.*, by a memorandum dated the 23rd December, 1836, "made over to them as their property until the sum advanced should be repaid, his chronometer and all his nautical instruments then on board the vessel, they allowing him the use of the same for the voyage." The chronometer was at this time in the hands of the makers for safe custody and regulation; the transfer or charge was not communicated to them. W. used the chronometer for the voyage, and returned it to the makers as before, and afterwards pledged it to the plaintiff as security for a debt:—Held, upon an issue under the interpleader act to try the property in the chronometer, that it vested in the defendants under the agreement of the 23rd December, 1836, until the advance was repaid. Reeves v. Capper, 877.

TRUSTEE.

See ATTORNEY, IV.

UNITY OF POSSESSION.

See LEASE, I. 1.

VARIANCE.

1. By articles of agreement between A. and B., the former covenanted, that, in consideration of the rents thereinafter covenanted to be paid, he would, when a certain fence and drains should have been completed, and any of the messuages thereinafter covenanted to be built should have been built and covered in, &c., by indentures of lease, *demise and lease unto B. or his nominee all such messuages respectively as should be so built* upon certain ground particularly described, and specified in a plan annexed to the agreement; with a reservation to A. of a right of way over the streets—habendum to B. for eighty years, on payment of certain annual sums for the first six years, and for the remaining seventy-four the yearly *rent* of 400*l.*: and B. covenanted, amongst other things, to erect a wall of certain dimensions along the west side of the land: and it was further agreed, that, until the whole of the messuages should be completed, and the agreement in all things fulfilled, two of the houses should remain unleased: with power to A. to re-enter upon any undemised part of the premises, for non-performance of any of the before mentioned covenants. B. took possession under this agreement, and paid rent.

The third plea stated the agreement as a covenant to demise the whole of the land therein described:—Held, a fatal variance. Alexander v. Bonnin, 611.

VENDOR AND PURCHASER.

I. *Material Misdescription in Particulars.*

Certain property was offered for sale by public auction, in lots. The particulars, in describing lot 12, stated that the purchaser of that lot would be entitled to a right of carriage and foot way thirteen feet wide over lot 13, as shewn upon a plan annexed to the particulars, bearing and paying one moiety of the expense of keeping the road in repair. Lot 13 was described as "a first-rate building plot," with a frontage to a place called the Crescent sweep; and it was stated that that lot would include the ground forming part

of the Crescent sweep comprised within the boundary of lot 13 by a line marked upon the plan, "subject for ever hereafter to the same rights of way and passage, and other rights and easements over the same, as are now enjoyed under the existing leases of the Crescent houses." The particulars of lot 7 described the two Crescent houses comprised in that lot as let on lease for a certain term, and stated that the lease might be seen at the office of the vendor's attorney, and would be produced at the sale. The plaintiff attended and bid at the sale; lots 12 & 13 were severally knocked down to him; and he signed a single contract of purchase for the two at the foot of one of the printed particulars, and paid a deposit. The plaintiff afterwards discovered, that, in the leases of the Crescent houses, there was reserved to the occupiers a right of way over lot 13, on foot and for the conveyance of gravel, manure, &c., from their gardens to the road. This right of way did not appear upon the plan:—Held, that, inasmuch as there was no sufficient disclosure of this right of way to enable a bidder by the exercise of ordinary vigilance to discover that such right existed, but, on the contrary, the plan being calculated to mislead, the misdescription, however unintentional, was such as to justify the plaintiff in refusing to accept either lot (the two being comprised in one contract, and the purchase of the one appearing to have induced the purchase of the other), but was entitled to recover back with interest the deposit paid to the auctioneer; and this notwithstanding a condition annexed to the particulars of sale—that, if any mistake were made in the description of the premises, or any other error should appear in the particulars, such mistake or error should not annul the sale, but a compensation or equivalent should be given or taken, as the case might require. Dykes v. Blake, 320.

II. *Contract, where voidable.*

By the 17 Geo. 3, c. 50, s. 8, the vendor at an auction is impowered to make it a condition of sale that the purchaser shall pay the auction-duty in addition to the purchase-money; and it is declared, that, upon his neglect or refusal to pay the same, the bidding "shall be null and void to all intents and purposes": —Held, that the contract is not, by reason of such neglect or refusal, absolutely *void*, but *voidable* only, at the option of the vendor. Malins v. Freeman, 187.

VENUE.

Changing.

1. In an action by husband and wife for an assault on the latter, the venue was originally laid in Middlesex, but had been changed at the defendants' instance to Yorkshire. The court refused, upon a suggestion, that, since the commencement of the action, the husband had been called to the bar, to restore the venue to Middlesex. Newton v. Harland, 186.

2. The court refused to discharge a rule for changing the venue from London to Glamorganshire, obtained upon the usual affidavit, although it was sworn that the cause of action arose partly in that county and partly in Ireland. Fisher v. Waring, 377.

3. The court refused to direct the jury process on the trial at bar of a writ of right for the recovery of lands in Buckinghamshire, to be awarded to the sheriff of Middlesex, upon a suggestion that the tenant was possessed of large property and great popularity and influence in the former county, and the demandants poor and obscure persons resident in Wales. Davies, Dem., Lowndes, Ten., 435.

VIEW.

In an action on a contract for building a chapel, the court refused to grant the plaintiff a rule for a view. Newham v. Taite, 574.

VOLUNTARY SETTLEMENT.

One C., who had agreed to purchase certain land of one H., contracted to convey the same to one W., who transferred his interest in the contract to Medley. Medley, in 1818, by settlement made on his marriage, covenanted, that, in case C. should be enabled to convey, he would pay C. 150*l*., and procure the land to be conveyed to the trustees; with a proviso, that, if C. should not be enabled to convey, then no obligation or liability at law or in equity should attach on Medley to procure or to endeavour to procure

a conveyance from any other person, or to pay the value of the same to the trustees by way of satisfaction for the same, nor should Medley in such case be precluded or disabled from purchasing the same for his own benefit. After the marriage had taken effect, viz. in June, 1818, Medley obtained a conveyance of the land from the trustees of H., the owner; and in February, 1819, by settlement, reciting the agreement to purchase, that C. had not been enabled to convey, that Medley had purchased of the owners, and that he was desirous to convey the land to the uses of his marriage settlement, conveyed the same to the trustees of such settlement accordingly:—Held, that, Medley, being under no obligation either in law or equity to transfer the land in question, which he had, in consequence of the inability of C. to convey it, purchased of the trustees of H., without the intervention of C., such settlement, being made after marriage, was purely voluntary, and void as against a bonâ fide purchaser for a valuable consideration. Doe d. Barnes v. Francis Roe, 525.

2. On the transfer of a mortgage for 10,000*l.*, with an additional advance of 4,000*l.*, it was proved that the 10,000*l.* were paid in bank-notes by the transferee to the original mortgagee by the direction and in the presence of the mortgagor, and the 4,000*l.* by a cheque to the mortgagor, as to which there was no proof that it was honoured:—Held, that the payment of the 10,000*l.* was a sufficient consideration as against one claiming under a voluntary settlement. Ib.

WAGER.

See PLEADING, IV.

WARRANT OF ATTORNEY.

I. *Attestation, where Party a Prisoner.*

1. A warrant of attorney was executed by a defendant in custody under mesne process, in the presence of a party *whom he introduced as his attorney*, and who as such attested his execution of the instrument, but who afterwards turned out to be uncertificated. Upon motion to set aside the judgment and execution issued upon this warrant of attorney:—Held, that the defendant was not under the circumstances entitled to relief—at least, without shewing that the fact of the individual who appeared for him being uncertificated, was unknown to him at the time. Cox v. Cannon, 347.

2. The circumstance of the attesting attorney being himself a prisoner, does not invalidate his attestation. Ib.

3. The court set aside a warrant of attorney, on the ground that the defendant's execution was attested by an attorney introduced by the plaintiff's attorney. Rice v. Linstead, 895.

II. *Entering up Judgment on.*

The court allowed judgment to be entered up on a warrant of attorney above one and under ten years old, upon an affidavit that, the defendant had been seen and conversed with by the deponent *twenty-seven* days before the motion was made. Powell v. Howard, 826.

WATERCOURSE.

Case for Obstruction of.

In an action for the obstruction of a watercourse, it appeared that the plaintiff had three years ago slightly altered the course of the stream, at a point between its exit from the defendant's land, where the obstruction took place, and its entrance upon his own land; and that, more than twenty years ago the stream had for some time ceased to flow to the plaintiff's land, and had resumed its ancient course only nineteen years before the commencement of the action:—Held, that the plaintiff's right was not thereby destroyed. Hall v. Swift, 167.

WITNESS.

See EVIDENCE.

WRIT OF REBELLION.

1. The commissioners named in, and charged with the execution of a writ of rebellion, have a right, at their discretion, to require the assistance of any of the liege subjects of the crown to aid and assist in the execution of the writ. Miller v. Knox, 1.

2. Such persons have such right, upon reasonable apprehension of resistance to the execution of the writ, although no actual resistance has taken place. Ib.

3. Such persons have such right as against persons appointed and acting as constables in Ireland under the statute

3 Geo. 4, c. 103: and that notwithstanding a regulation made in the manner pointed out by that act, prohibiting them from interfering "in the execution of any writ, decree, or civil order, or in driving for rent, tithe, or taxes, unless called out by a magistrate, or the high or sub-sheriff in person," in which case they are to consider it their duty only to protect those persons in the execution of their office—"excepting in the execution of any process directed to them for levying the amount of any recognisance forfeited to his majesty, his heirs and successors, or of any fines imposed on any jurors, witnesses, parties, or persons at any assizes or commission of oyer and terminer, or gaol delivery, or session of the peace, in the county in and for which such constable shall be appointed, pursuant to the statute 3 Geo. 4, c. 103, s. 7;" and directing that constables shall not be employed in revenue duty, unless when specially ordered. Ib.

4. If a stranger to the proceedings in the cause, but liable to be called upon to assist in the execution of a writ of rebellion, be regularly called upon to render such assistance, and decline so to do, the court out of which such writ issued may commit such person as guilty of a contempt of such court. Ib.

WRIT OF RIGHT.

The court refused to direct the jury process on the trial at bar of a writ of right for the recovery of lands in Buckinghamshire, to be awarded to the sheriff of Middlesex, upon a suggestion that the tenant was possessed of large property and great popularity and influence in the former county, and the demandants poor and obscure persons resident in Wales, Davies, dem., Lowndes, ten., 435.

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